

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1106

E. S. EVANS, ET AL., PETITIONERS,

vs.

GUYTON G. ABNEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF GEORGIA

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LIST OF IMPORTANT DATES ON WHICH PLEADINGS WERE FILED,
HEARINGS HELD, AND ORDERS ENTERED:

1. Petition filed May 4, 1963.
Exhibits A & B—Last Will and Testament of Augustus Octavius Bacon, dated March 28, 1911 and the codicil thereto, dated September 6, 1913.
2. Answer of defendant, City of Macon, filed May 20, 1963.
3. Answer of defendants, Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor trustees, etc., filed May 27, 1963.
4. Motion for summary judgment filed May 27, 1963.
5. Motion of Rev. E. S. Evans et al. to intervene and order thereon filed May 27, 1963.
6. Intervenors' petition filed June 18, 1963.
7. Amendment to plaintiff's petition and order allowing, filed January 8, 1964.
8. Petition of A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks for intervention and order allowing, filed January 8, 1964.
9. Amendment to answer and cross bill and order allowing, filed January 8, 1964.
10. Amendment to answer of City of Macon and order allowing, filed February 5, 1964.

Exhibit A—Resolution of the Mayor and Council of the City of Macon adopted February 4, 1964.

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Exhibit B—Resignation of the City of Macon as
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11. Amendment to intervenors' petition and order
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12. Order and decree of March 10, 1964.

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13. Acceptance of Trust filed March 12, 1964.

14. Argument in Georgia Supreme Court, June 8, 1964.

15. Opinion of Georgia Supreme Court dated Septem-
ber 28, 1964.

16. Petition for certiorari filed March 5, 1965.

17. Certiorari granted April 26, 1965.

18. Opinion and judgment of Supreme Court of the
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19. Opinion of Georgia Supreme Court on remand dated
March 14, 1966.

20. Motion for Summary Judgment, and Order filed
November 10, 1966.

21. Response to Motion for Summary Judgment filed
by Successor Trustees under Will of Augustus Oc-
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22. Response to Motion for Summary Judgment filed by Successor Trustees under Will of Augustus Octavius Bacon, deceased filed January 16, 1967.
23. Response to Motion for Summary Judgment filed by Successor Trustees under Will of Augustus Octavius Bacon filed January 16, 1967.
24. Intervenors' Supplemental Response to Motion for Summary Judgment filed by Successor Trustees under Will of A. O. Bacon filed June 27, 1967.
25. Hearing on Motion for Summary Judgment, June 29, 1967.
26. Amendment to Motion for Summary Judgment and Order filed June 29, 1967.
27. Order making Attorney General a Party to case filed July 21, 1967.
28. Intervenors' Second Supplemental Response to Motion for Summary Judgment filed by Successor Trustees under the Will of A. O. Bacon filed August 10, 1967.
29. Intervenors' Third Supplemental Response to Motion for Summary Judgment filed by Successor Trustees under the Will of A. O. Bacon filed August 17, 1967.
30. Supplement to Motion for Summary Judgment as Amended filed August 21, 1967.
31. Second Supplement to Motion for Summary Judgment as amended filed August 28, 1967.

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32. Intervenors' Fourth Supplemental Response to Motion for Summary Judgment filed by Successor Trustees under Will of A. O. Bacon, filed August 31, 1967.
33. Response by Attorney General to Motion for Summary Judgment filed November 1, 1967.
34. Order and Decree May 14, 1968, filed May 14, 1968.
35. Copy of Letter of Judge to Attorneys filed May 14, 1968.
36. Notice of Appeal filed June 10, 1968.
37. Enumeration of Errors filed July 8, 1968.
38. Decision of Georgia Supreme Court of December 5, 1968.
39. Judgment of December 5, 1968.
40. Order granting stay pending certiorari dated December 13, 1968.
41. Petition for Writ of Certiorari filed March 3, 1969.
42. Certiorari granted, May 5, 1969.

EXPLANATORY NOTE

Pages 1 to 94 *infra* are an exact reproduction of the printed record in this Court in Evans v. Newton, No. 61, Oct. Term 1965. These pages were reproduced in this manner by agreement of counsel. Folio page references in pages 1 to 94 are to the 1965 original record and differ slightly from pagination in the present record.

[fol. 1]

IN THE
SUPREME COURT OF THE STATE OF GEORGIA
Docket No. 22534

REV. E. S. EVANS, et al., Intervenors, Plaintiffs in error,

v.

CHARLES E. NEWTON, et al., Defendants in error.

BILL OF EXCEPTIONS—Filed May 8, 1964

To the Honorable Chief Justice and the Honorable Justices
of the Supreme Court of Georgia:

Be It Remembered that on February 5, 1964, there came
on for hearing in Bibb Superior Court before the trial
judge, the Honorable Oscar L. Long, a Motion for Sum-
mary Judgment which had been submitted by the peti-
tioners, defendants-in-error, after which arguments and
authorities were submitted to the Court by parties for
each side. Thereafter, and on the 10th day of March, 1964
the said trial judge entered his order and decree granting
the said motion.

To the said Order of the said trial judge the plaintiffs-
in-error did except, now except and assign the ruling of
the trial judge as reflected in his decree and order as being
contrary to the law and facts in the case. Plaintiffs-in-
error contend that said Order denies equal protection to
the plaintiffs-in-error and others similarly situated as guar-
anteed by the Fourteenth Amendment to the United States
Constitution, for the reason that said Order has the effect
of prohibiting Negroes from the use of the park which is
the subject matter of this litigation. Further, plaintiffs-
in-error contend that said ruling, order and decree also
denies to the plaintiffs-in-error, and others similarly situ-
ated, equal protection of the laws as guaranteed by the
Fourteenth Amendment to the United States Constitution,

in that, this said Court has accepted the resignation of the City of Macon as Trustees and appointed new Trustees for the purpose of enforcing the provisions of the Last Will and Testament of A. O. Bacon which contains a racially discriminatory testamentary provision and which plaintiffs-in-error contend was originally commanded by the State.

Error is further assigned to the said Order on the ground, and the plaintiffs-in-error contend, that Section 108-202, Georgia Code Annotated, 1933 Edition, has the effect of requiring that the racially discriminatory provisions of the testamentary trust which is a part of the subject matter of this litigation be declared null and void. Said Code Section reads as follows:

108-202. (4604) *Cy pres.*—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention. (110 Ga. 540, 543 (35 S.E. 639).)

[fol. 2] Plaintiffs in error further assign error to the said trial judge's said ruling, order and decree on the ground that the Acts of Georgia of 1905, page 117, commonly referred to as Georgia Code Section 69-504, hereinafter set out, is violative of the equal protection clause of the Fourteenth Amendment for the reason that said provision prescribes racial discrimination and since the racially discriminatory provision in A. O. Bacon's Last Will and Testament, the plaintiffs-in-error contend, was dictated by that unconstitutional statute which received enforcement by said statute, all in violation of the Fourteenth Amendment to the United States Constitution, Sec. 1. Said Act reads as follows:

69-504 (890) *Gifts for public parks or pleasure grounds.*—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated

in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.)

Plaintiffs-in-error specify as material to a clear understanding of the errors complained of the following documents of the record, to wit:

1. Petition, filed May 4, 1963.
2. Answer of the City of Macon, filed May 20, 1963.
3. Answer of Guyton G. Abney, J. D. Crump, T. I. Denmark and W. G. Lee, as Trustee successors under the Last Will and Testament of A. O. Bacon.
4. Motion for Summary Judgment dated May 27, 1963.
5. Motion of Rev. E. S. Evans, et al. to intervene, dated May 29, 1963, with order thereon.
6. Intervenors Petition filed June 18, 1963.
7. Amendment to Petition filed January 8, 1964.
8. Petition for intervention and order thereon dated January 8, 1964.
9. Amendment to answer and Cross Bill, with order thereon, filed January 8, 1964.
10. Amendment to answer of City of Macon, filed February 5, 1964.

11. Amendment of Intervenors' Petition, filed March 5, 1964.
12. Trial Judge's Order and Decree dated March 10, 1964.
13. Resignation of City of Macon as Trustees.
14. Acceptance of Trust filed March 12, 1964.

[fol. 3] And Now, come Rev. E. S. Evans, et al., within the time provided by law, and assigning error on all the rulings complained of as being contrary to law, tender this their Bill of Exceptions and pray that the same may be certified to and transmitted to the Supreme Court of Georgia in order that the alleged errors may be considered and corrected, all as provided by law.

Donald L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-error.

859½ Hunter St. N.W., Atlanta, Georgia 30314, Jackson 5-8372.

[fol. 4]

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS
—April 14, 1965

I do certify that the foregoing Bill of Exceptions was tendered to me on the 9th day of April, 1964, that the same is true and specifies all the evidence, and specifies all of the record material to a clear understanding of the errors complained of and the Clerk of the Superior Court of Bibb County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this Bill of Exceptions specified, and of the record in said case as are in this Bill of Exceptions specified, and certify the same as such and cause the same to be transmitted to the Supreme Court of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 14 day of April, 1964.

O. L. Long, Judge, Bibb Superior Court.

[fol. 5] The within and foregoing Bill of Exceptions tendered this 9 day of April, 1964.

O. L. Long

[fol. 6] Acknowledgments of Service by Attorneys for Defendants-in-Error (omitted in printing).

[fol. 8] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 10] [File endorsement omitted]

[fol. 12]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

PETITION—FILED May 4, 1963

Charles E. Newton, Mrs. T. J. Stewart, Frank M. Wilingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody, all of said State and County, in their respective capacities as members of the Board of Managers of Baconsfield, herein-after referred to as the "Board", bring this bill in equity and name as defendants the following parties:

The City of Macon, in its capacity as Trustee under Item 1X of the Last Will and Testament of Augustus Octavius Bacon, deceased:

Guyton G. Abeny, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, Deceased, holding assets for the benefit of certain designated beneficiaries who will take the residuary estate under the terms of said Will, but subject to the provisions of Item 1X thereof as herein more fully set forth.

1.

This Honorable Court has jurisdiction of this proceeding in that all of the defendants against whom substantial relief is prayed herein are residents of Bibb County, [fol. 13] Georgia; and for the further reason that the trust assets, as hereinafter described and which form the subject

matter of this bill in equity, are situate in said State and County.

2.

Your petitioners are the duly qualified and acting members of the Board of Managers of Baconsfield, created and established under the provisions of Item 1X of said Last Will and Testament of Augustus Ocavius Bacon.

3.

The defendant the City of Macon is a municipality duly created by Act of the Legislature of the State of Georgia, and, under said Item 1X of said Will, holds, as Trustee, the legal title to that tract or parcel of land situate in Macon, Bibb County, Georgia, known as "Baconsfield", and more fully described in said Will.

4.

The defendants Guyton G. Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee are successor Trustees under said Last Will and Testament, and codicil thereto, and are duly qualified and now acting in such capacities, respectively.

5.

The Last Will and Testament of Augustus Octavius Bacon, dated the 28th day of March, 1911, and the codicil thereto, dated the 6th day of September, 1913, have been duly probated in solemn form in the Court of Ordinary of [fol. 14] Bibb County, Georgia, a copy thereof being attached hereto as Exhibits "A" and "B" and by reference made a part hereof.

6.

Under Item 1X of said Will the testator conveyed all his right, title and interest in and to Baconsfield, the parcel referred to being fully described in said Item 1X, unto

"The Mayor and Council of the City of Macon", the then designation of the same municipal corporation which is now the "City of Macon".

7.

Your petitioners show that said property was so conveyed to the defendant the City of Macon "in trust for the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon, to be by them forever used and enjoyed as a park and pleasure ground", subject however, to the restrictions, government, management, rules and control of the Board of Managers of Baconsfield, your petitioners herein.

8.

Although under the provisions of said Will, the defendant the City of Macon, as Trustee of said properties, is under a paramount duty to carry out the provisions of said trust, the Board has complete and unrestricted control and management of said property, with power to make all needful regulations for the preservation and improvement thereof, and rules for its use and enjoyment, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable, or whose [fol. 15] conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of said property for the purposes contemplated by the testator.

9.

As directed in said Will, the Board has over the years confined the exclusive use of Baconsfield to those persons designated in said Will, although under the provisions thereof it has not objected to the use of said property by

the white men of the City of Macon and white persons of other communities.

10.

Your petitioners show, however, that although they have called the attention of the defendant the City of Macon to the provisions of Item 1X of said Will and its duties as Trustee thereunder, said defendant is now failing and refusing to carry out and enforce the provisions of said Will with respect to the exclusive use of Baconsfield by the white women of the City of Macon and white boys and white girls, and white men when so authorized by the Board, but on the contrary, has recently permitted and is now permitting the continuous use of said premises by members of the colored race, in direct contravention of the terms of the trust created by the testator, and under which said defendant holds title to Baconsfield, and in complete disregard and violation of the explicit mandate of the testa-[fol. 16] tor as set forth in said Will.

11.

Your petitioners are without power to enforce the terms of said trust with respect to the aforesaid use of Baconsfield, except to request the defendant the City of Macon to comply with the terms of the Trust. If, however, a new Trustee, or new Trustees, are appointed by this Court then, if necessary, said Trustee or Trustees, by the exercise of a writ of mandamus or otherwise could require the defendant the City of Macon or other proper law enforcement officers to carry out their duties so that the terms of the trust, which the City of Macon now is violating in its capacity as Trustee, may be carried out by the new Trustee or Trustees.

12.

Your petitioners show that the aforesaid breach of duty on the part of the defendant the City of Macon, as Trus-

tee, constitutes such a violation of trust as to require its removal as Trustee.

13.

Your petitioners bring this petition for the purpose of removing the defendant the City of Macon as Trustee of said properties, and recommend to this Honorable Court, as a court of equity, that it appoint three (3) freeholders, residents of the City of Macon, to serve as successor Trustees to defendant the City of Macon and who in their capacity as Trustees, being private citizens, can and will under the law carry out the testator's wishes and intent with respect to the use and enjoyment of Baconsfield, and the purposes for which said trust was established.

[fol. 17] Wherefore, your petitioners pray:

- (a) That process do issue in terms of law;
- (b) That the defendant the City of Macon be removed as Trustee under said Will;
- (c) That this Court, as a court of equity, enter a decree appointing one or more freeholders, residents of the City of Macon, to serve as Trustee or Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, with power on the part of the Board to name, subject to the approval of this Court, from time to time, a successor Trustee or Trustees upon the death or disqualification of any such Trustee, or should any such Trustee for any reason cease to serve in such capacity;
- (d) That legal title to Baconsfield, as well as to any other assets now held by the defendant the City of Macon, in its capacity as such Trustee, be decreed to be in the Trustee or Trustees so appointed by this Court, and in their respective successor or successors, for the uses, purposes and trusts originally declared by the testator, Augustus Octavius Bacon;

(e) That your petitioners have such other and further relief as the Court may deem fit and proper.

Jones, Sparks, Benton & Cork, Attorneys for Petitioners.

[fol. 18] *Duly sworn to by Frank M. Willingham, jurat omitted in printing.*

[fol. 19]

EXHIBIT "A" TO PETITION

COPY OF LAST WILL AND TESTAMENT OF
AUGUSTUS OCTAVIUS BACON

I, Augustus Octavius Bacon, of said State and County, being in perfect health and of sound and disposing mind and memory, and desiring to make disposition, while so capacitated, of the property which, under Providence, has been the fruit solely of my personal industry and toil, do hereby make, publish and declare this my last Will and Testament, hereby expressly and entirely revoking and cancelling all other Wills heretofore made by me.

Item 1st

I commit my soul to God, in the humble hope that in spite of my many weaknesses, imperfections, faults and misdeeds, I shall be reuinited in a happy immortality with my kindred and friends, and particularly with the members of my immediate family, to whose happiness and welfare my life has been gladly and unsparingly devoted.

Item 2nd

I direct that my body be buried in Rose Hill Cemetery in the lot recently purchased by me, and that the bodies of my two ever-lamented sons, Lamar Bacon, who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr., who died on the 27th day of November of the same year, shall be removed from the lot in which they are now

interred, and re-interred in the same lot now owned by me, and I further direct that my Trustees hereinafter named, or their successors, shall erect over the graves of myself and of my two sons, and also over the graves of all other [fol. 20] members of my family who shall die during the continuance of the trust herein created, monuments in their discretion suitable and appropriate therefor.

Item 3rd

I direct that all my just debts be paid as early as practicable after my death.

Item 4th

My household and kitchen furniture in the main dwelling house, I give and bequeath to my wife, Mrs. Virginia Lamar Bacon, during the full term of her natural life, to be thereafter disposed of by her will as she may direct.

Item 5th

My household furniture in the little cottage commonly called "The Hut" which I have personally occupied for years, as well as all of my books of every kind whereever located, together with all of my papers, pictures, jewelry, personal apparel and all other similar personal effects, I give to my two beloved daughters, Mrs. Mary Louise Bacon Sparks, and Mrs. Augusta Lamar Bacon Curry, to be divided between them as they shall agree with each other, requesting that they give or transmit to their several children such of said articles as it may be thought they would prize and preserve.

Item 6th

All of my estate both real and personal, of every description, and wherever situate, excepting therefrom only so much thereof as is otherwise disposed of by this Will, either in the clauses precedent or subsequent hereto, I [fol. 21] hereby give, bequeath and devise unto my tried

and trusted friends Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, all of my said bounty, in trust for the persons and purposes hereinafter named and specified, with the estates and remainders, and with the powers and limitations herein specifically designated and set forth as follows:

(a) Except as otherwise specified in this Will, all of the corpus of my said property—including both that held by me in trust, and that held in fee simple—whether consisting of the property as it exists at the time of my death, or of the property into which it may be subsequently converted, or of property subsequently acquired for my estate, shall be held by the said Trustees and their successors in trust for the sole use, benefit and enjoyment of my wife, Mrs. Virginia Lamar Bacon, and of my two daughters, Mrs. Mary Louise Bacon Sparks and Mrs. Augusta Lamar Bacon Curry, for and during the term of their natural lives, and after their several deaths, with the several remainders as herein specified and provided, and to the uses, benefit and enjoyment of the beneficiaries specified thereunder; and to fully effect the same, the said Trustees shall annually, so long as the said Mrs. Bacon, Mrs. Sparks and Mrs. Curry shall all remain in life, pay to each of them one-third of the net annual revenue derived from said property after the payment of all [fol. 22] proper and legitimate expenses incident thereto.

(b) Upon the death of Mrs. Virginia Lamar Bacon, I direct that all of the property specified and embraced within this Item 6th of my Will, including the one-third theretofore held in trust for Mrs. Virginia Lamar Bacon, shall be by the said Trustees divided into two equal parts, one of which parts shall be held by said Trustees in trust for the sole use, benefit and enjoyment of my daughter, Mrs. Mary Louise Bacon Sparks, during the full term of her natural life with the re-

mainders in the same as hereinafter specified, and the net revenues from the same shall during her life be annually paid to her; and the other of said equal parts shall be held by said Trustees in trust for the sole use, benefit and enjoyment of my daughter, Augusta Lamar Bacon Curry during the full term of her natural life, with the remainders in the same as hereinafter specified, and the net revenue from the same, shall during her life, be annually paid to her.

(c) Upon the death of my daughter Mary Louise Bacon Sparks, I direct that the portion of the property embraced in this Item 6th of my Will and held in trust for her during the term of her natural life as aforesaid shall thereafter be held by said Trustees and their successors of the sole use, benefit and enjoyment of the [fol. 23] children now in life of my said daughter, Mary Louise Bacon Sparks. During the full term of the life of Willis B. Sparks, Senior, who married my said daughter, Mary Louise, with remainder after his death to the children of the said children now in life of my said daughter Mary Louise, to-wit: the children of Augustus Octavius Bacon Sparks, Willis B. Sparks, Junior; Virginia Lamar Sparks and of Garton Sparks. But if at the time of the death of my daughter Mary Louise, and any one or more of the said children of my said daughter Mary Louise shall then be in life, the proportionate interest of each of said children of my daughter Mary Louise shall then vest in said child in fee simple, and thereupon the said trust to that extent shall cease and terminate. If during the life of the said Willis B. Sparks, Senior, and after the death of my daughter, Mary Louise, any one of her said children hereinbefore named, shall die leaving neither husband, nor wife, nor child, the interest of said child so dying shall thereupon descend to, and enure in equal parts to the benefit of the survivors of the said children, and shall thereafter during the continuance of this trust, be held by the said Trustees for the use,

benefit and enjoyment of the survivors of the said children. The intent and purpose of this provision of my Will is that in no event and under no circumstances shall the trust cease and the title in and to said property, or any part thereof, vest in fee simple, in either of my said daughter Mary Louise, or in any of her descendants, during the term of the natural life of the said Willis B. Sparks, Senior; and further that the remainders hereinbefore specified shall be preserved and take effect after the death of the said Willis B. Sparks, Senior.

(d) Upon the death of my daughter, Augusta Lamar Bacon Curry, I direct that the portion of the property embraced in this Item, and held in trust for her during the term of her natural life as aforesaid, shall thereafter be held by said trustees and their successors, for the sole use, benefit and enjoyment of the children now in life of my said daughter, Augusta Lamar, to-wit: Shirley Holcomb Curry, Marie Louise Curry and Manly Lamar Curry, until her youngest child, the said Manly Lamar Bacon Curry, shall reach the age of twenty-one years, when the proportionate part of said property, shall vest in each of said children, and the trust, to the extent thereof in said property, shall thereupon cease and determine. But if either of the said named children or my said daughter, Augusta Lamar, shall, without leaving husband, or wife or child, die before the said Manly Lamar Bacon Curry shall reach, or would, if in life, reach the age of twenty-one years, the portion of the said child so dying shall thereafter be held in trust for the use, benefit and enjoyment of the survivors of the said named children; [fol. 25] and if either of the said named children of my said daughter, Augusta Lamar, shall, before the said Manly Lamar reaches, or would, if in life, reach the age of twenty-one years, die leaving a child or children in life, the portion of the child so dying shall be

held in trust for his or her surviving child or children until they severally arrive at the age of twenty-one years.

Item 7th

To my said Trustees hereinbefore named, and to their successors, I give full power and authority to sell so much of the property of my estate as is embraced in the foregoing Sixth Item of this Will, both real and personal or any part thereof in their discretion, and to make conveyances thereof, with full and perfect title free from said trusts, limitations and remainders, to the purchasers of the same without any authority asked from or granted by any court, or officer or any person whomsoever; said sales to be at either public or private sale, and no such terms as they in their discretion shall determine, and either with or without public or other advertisement of the same. But the net proceeds of all such sales, except as otherwise provided in this Will, shall be by the said Trustees reinvested in other real estate in the State of Georgia; which said real estate, when thus purchased for reinvestment, shall in each and every particular be held in the name of said Trustees or their successors subject to the same trusts and uses, and limited to the same estates and remainders as are specified in the foregoing Sixth Item of this Will; and the [fol. 26] title deeds taken to said real estate shall, by reference to this Will express that the same is conveyed for said trusts and uses, and with the said estates and remainders as are herein specified. The books of said Trustees shall contain an accurate and complete statement of all real estate and other property sold and purchased on account of said trust estate, and also accurate accounts of all monies received and disbursed on account of said estate. I urge the said Trustees in this connection not to sell the real property of my estate hurriedly, but only when the same can be done to the best advantage, as the said property can in large part be used in such manner as to provide revenue, and the said property will in a reasonable short

time be very valuable for sale for residence purposes. The power to sell I intend to embrace in all its features and requirements and exemptions, the power to lease or rent.

Item 8th

During the lives of Mrs. Virginia L. Bacon and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, it is my will that they shall each receive annually through said Trustees, from my estate at least the full sum of \$1,200.00. If the one third of the net annual revenues derived from my estate does not in any year furnish an amount sufficient to pay the full sum of \$1,200.00 to each of them, I direct that the deficiency be made up by taking from the amount received from the sales of property embraced in Item Sixth of this Will, as much as will be necessary to give to each of the three, the said full sum of \$1,200.00.

[fol. 27] Upon the death of their mother, Mrs. Virginia Lamar Bacon, it is my will that each of my said daughters Mary Louise and Augusta Lamar, shall receive annually, through said Trustees, from my estate at least the sum of \$1,800.00. If the property set apart for the use and enjoyment of each of my said daughters upon the death of their mother, to be held as hereinbefore provided in trust for each of them during life, shall not in any year furnish an amount of net revenue sufficient to pay to each or either of them the full sum of \$1,800.00, I direct that the deficiency be made up by sales of property so set apart; so that any deficiency in the annual amount due to my daughter Mary Louise shall be made up by sales of property set apart for her use; and in like manner any deficiency in the annual amount due to my daughter Augusta Lamar shall be made up by sales of property set apart for her use; and the property so sold shall, as hereinbefore provided, be thereby freed from said trusts and the estates, limitations and remainders thereunder. The purpose of this provision is not to limit my wife and daughters to the amount named, but to ensure to them at least said amounts in case the net revenues shall be insufficient for that purpose.

Item 9th

I direct that there by said Trustees laid off and accurately defined and permanently marked by enduring monuments, the following described part of my farm which is situated in part within and part without the corporate limits of the City of Macon, and known as "Baconfield," the same to be set apart and dedicated to the purposes, uses and enjoyments [fol. 28] hereinafter more fully set forth and detailed. The said part of the property thus set apart is bounded as follows: there is on the Southeastern part of my said farm a four acre rectangular tract which formerly belonged to James Pepper, and which is commonly known as the "Pepper Place" the same having been purchased and added to my farm. For this description, beginning at the South-eastern corner of said rectangular tract, the boundary line of the property runs in a Northerly direction along the Eastern boundary line of said Pepper Place and thereafter in a direct prolongation of the same to a point nine hundred and sixty-three feet and five-tenths from the said starting point, thence in a slightly northwestern direction sixty-three feet and five-tenths, thence in a northerly direction three hundred and thirty-two feet across Boulevard Baconfield to a point on the Western side of said Boulevard, thence three hundred and sixteen feet along the western border of said Boulevard to a point on the same immediately opposite the junction of said Boulevard and Gray Street, thence, in a direction a little West of North, twenty-four hundred and eighty feet to an elm tree, thence at right angles sixteen hundred and sixty-two feet to the bank of the Ocmulgee River, thence in a Southeasterly direction along the bank of said river thirty-three hundred and ninety seven feet, thence in a direct line to the Southwest corner of the said Pepper lot, thence four hundred and thirty-seven feet along the Southern boundary line of said Pepper lot to the original starting point; the said metes and bounds of the said tract of land being correctly platted and defined on a map of the same hereto attached, made [fol. 29] by H. D. Cutter and upon which for the purpose of

identification, I have endorsed my original signature. The larger part of the property thus described and bounded is a portion of a trust estate originating with me and created solely by me for the benefit of my wife and children during my life and for their benefit and use after my death in such estates and with such remainders as should be specified and directed by me in my last Will and Testament. For the purpose of carrying out fully the purpose and intent of the trust thus created, I hereby give, bequeath and devise the said property consisting of the tract of land hereinbefore described and bounded and platted on said map unto the said Trustees, viz. Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, in trust for the sole joint use, benefit and enjoyment of my wife, Virginia Lamar Bacon, and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, during the term of their natural lives, as follows: So long as they shall all live they shall be entitled to the equal enjoyment and use of the same including all revenues and profits in any way derived therefrom. When Mrs. Virginia Lamar Bacon shall die, the use, benefit and enjoyment of the entire property herein described and bounded shall belong to my two said daughters equally, including all revenues and profits in any way derived from the same, during the full term of their natural lives. Upon the death of either of my said daughters, her interest in said property shall be enjoyed by her children and the survivors of them until the death of my last surviving daughter. Upon the death of my said wife and of each of my said daughters, [fol. 30] and of the last survivors of them, the trust created in this property by this said Ninth Item of this Will in the said tract of land thus defened, bounded and platted shall cease, and thereafter shall close all interest and right of enjoyment of any person or persons whomsoever in said property except as hereinafter specified and provided, to-wit: When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immedi-

ately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for: the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons.

[fol. 31] The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex,

who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property the white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for [fol. 32] women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield, beginning at the north Macon bridge and including the "Pepper Place," also all of said property lying on the river which is properly classed as low lands, or river bottom; but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified. If it should be held that said property is subject to taxation when devoted to such uses as a park or pleasure ground, I request that proper steps be taken to secure from the State of Georgia a perpetual release from all liability to taxation.

I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

I am, however, without hesitation in the opinion that in their social relations the two races (white and negro) [fol. 33] should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified, by my gratitude to and love of the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr. who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated. I direct that said property during the lives of my said wife and my two said daughters shall continue to be known and designated as "Baconsfield" and that after their death, it shall be forever and perpetually known as "Baconsfield," and shall be so designated in all matters, documents and papers relating thereto.

While I make no restrictions, I request that the Managers will preserve on the property my present house residence, and the smaller house nearby which I have personally occupied for so many years and which I have called "The Hut" the said houses to be used to the best advantage, and in such localities on the property as may be most desirable, for the comfort, convenience and pleasure of the white women, girls, boys and children herein designated: and I trust that the managers of said property may find it to the best inter-

[fol. 34] est of those who are to enjoy this property that there shall be perpetually preserved the present woods and trees upon the same. And I specifically direct that during the said trust estate in said property for the uses and benefit of my wife Virginia Lamar Bacon and of my two daughters Mary Louise Bacon Sparks, and Augusta Lamar Bacon Curry, neither the said residence house nor the said smaller house known as "The Hut" shall be removed or destroyed or materially altered by addition or otherwise, but that the same during the entire terms of said trust estate for life, be carefully preserved in their present condition; and further that during the terms of said trust estates and during the lives of my said wife and my two said daughters, the woods and trees on said property be carefully preserved, and that no one of them be cut down or destroyed for any purpose whatsoever; and I further specifically provide and direct that the said trustees hereinbefore named and their successors shall not have power or authority to sell or otherwise alienate or dispose of the tract of land thus described, bounded and platted or any part thereof during the continuance of said trust or trusts or at any other time, under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others.

Item 10th

To make still further provision for the preservation, management and improvement of the property set apart in the foregoing 9th Item of this Will as a park and pleasure grounds as aforesaid, I will and bequeath to the Mayor and Council of the City of Macon, and to their successors, ten [fol. 35] bonds of the Macon Railway and Light Co., each of said ten bonds being for \$1000.00 and in the aggregate being for \$10,000.00 and bearing interest at the rate of five per cent per annum, and at present in the custody of The Riggs National Bank in Washington, D. C., the said bonds and all monies or things of value resulting and derived therefrom to be held by the said Mayor and Council

of the City of Macon and their successors for the following trusts and uses, to-wit: So long as the property known and to be known perpetually as "Baconsfield," specified, bounded and described in the foregoing 9th Item of this Will, shall continue to be held in trust by the Trustees named in the said foregoing 9th Item and their successors for the use and benefit of my said wife and my two said daughters, or either of them, until the said property shall vest in the Mayor and Council of the City of Macon to be held in trust for the purposes specified and for the uses directed in the said 9th Item. The said Mayor and Council of the City of Macon shall as said Trustees collect the semi-annual interest which shall be paid on said bonds, and as promptly as practicable invest the same in interest bearing bonds to be added to and included in said trust fund; and the interest received on the additional bonds thus purchased, and from all other bonds additional thereto resulting from and accruing to said fund, shall in like manner be reinvesting in interest bearing bonds, so that all income from said fund or in any manner accruing to said fund shall as far as practicable be semiannually compounded and added to the principal of the original fund. When the said Trustees named in the said 9th Item and their successors shall cease [fol. 36] to hold said property in trust for my said wife and my said daughters, as provided in the said 9th Item, and when as therein provided the Mayor and Council of the City of Macon shall as Trustees be vested with said property and the title to the same for the uses therein set forth, they shall as may be required for the preservation, maintenance and improvement of said park and pleasure ground, pay over to the Board of Managers hereinbefore provided for, the income subsequently received from said trust fund constituted of and resulting from the said bonds; and all income derived from said property, and from said bonds, and the proceeds thereof, when not required for the needs of said park and pleasure ground, be added to the said principal fund, to the end that from increased income it may be in greater and ever increasing degree beautiful and developed and equipped for the benefit and enjoyment of those for

whose pleasure and happiness it is designated. If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said [fol. 37] park and pleasure ground, unless said required power is conferred by appropriate legislation. Should the Mayor and Council of the City of Macon at any time consent to do so, then I direct that they be authorized to receive the fund constituted of said bonds and all additions thereto and the proceeds thereof, and cover the same into the treasury of the City, in consideration of the perpetual obligation of the City to be evidenced by its bond or otherwise, to provide and pay over annually to the said Board of Managers an amount equal to five per centum interest upon the sum thus covered into the treasury, to be devoted by said Board to the uses hereinbefore specified. In making this bequest as expressed in this and the preceding item of my Will, I have been mindful to preserve the full use and enjoyment of the real estate to my wife and daughters during their natural lives, and also of the fact that the entire bequest in value represents a very much smaller proportion of my estate than would have been the share in it of my two sons had they lived. As there will be no one of my descendants who now bears my name either by right or birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys

of their own race in the community of which they once formed a happy part.

Item 11th

For many years I have had someone employed to care for the cemetery lot at Midway Church in Liberty County in [fol. 38] which my father, Rev. Augustus Octavius Bacon and my mother Mary Louise Bacon and my only brother, Samuel Jones Bacon, are buried, and also my uncle, Dr. Albert Summer Bacon, the small sum of \$10.00 per year having been found sufficient for that purpose. I direct that the payment of said amount, or more if required, be made annually for said purpose, by the said trustees of my estate, and that the same be made a perpetual charge upon the property of my estate when distributed to my devisees and legatees; and I conjure my descendants to the remotest generation to so provide that the said cemetery lot shall always be properly preserved and cared for. I make a like bequest and request for the proper care of the burial lot of my wife's family in Rose Hill Cemetery in Macon, and for the proper care of my own cemetery lot in Macon.

Item 12th

The provision herein made for my wife, Mrs. Virginia Lamar Bacon, is in all its parts, both as to realty and personality through said Trustees, intended to be in lieu of dower and first year's support. If she should refuse to accept the same and elect to take her dower, then it is my will that the remainder interest in the real estate set apart as her dower shall vest in my said Trustees for the trusts and estates and uses as hereinbefore provided should obtain following her death.

Item 13th

I direct that said Trustees shall be authorized to use a portion of the money realized from the sale of lots for residences or other purposes, in the improvement of other [fol. 39] portions of the property with the view of secur-

ing increased revenue therefrom for the enjoyment of my wife and daughters and their children; but I desire that this power shall be sparingly exercised and only in case where the prospects of such increased revenue is reasonable certain.

Item 14th

In case of the occurrence of a vacancy among the said Trustees herein named and appointed in the Sixth Item of this Will, I direct that it be filled by a suitable person selected by the remaining Trustees, such selection and the acceptance of the same to be evidenced in writing, and to be recorded upon the Minutes of the Superior Court of Bibb County upon petition by said remaining Trustees, and order of the Court granting authority to do so.

The said Trustees and their successors shall not be required to give any bond for the proper and faithful performance of their duties under said trust, or for any other purpose whatsoever, nor shall they be required to make any returns of property or of money received and disbursed, or of any other actings and doings under said trust to any court or other authority, but shall only be required to keep accurate books of accounts of property and of receipts and disbursements which shall be open to the inspection of the beneficiaries under this Will. They shall also make to the Mayor and Council of the City of Macon annual reports, relative to the conditions and preservation of the property herein designated as "Baconsfield" and embraced within the provisions of the Ninth Item of this Will, and particularly as to the preservation of the buildings and trees [fol. 40] upon the same. I have confidence that my said Trustees will execute this trust as economically as practicable, and I recognize and desire that such one of this number as may be charged more immediately with the work shall, through commissions or sales or otherwise, receive a fair compensation for his time and labor expended thereon.

Item 15th

I am firmly convinced both from observation and personal experience that it is unwise for personal relatives to have business transactions and business relations with each other, and I specifically direct that, except as provided in the ninth Item of this Will in the case of the said Board of Managers, no blood relation of myself, and more particularly no one related to me by marriage, and most particularly no present or any future husband of said daughters or of either of my granddaughters, either during the lives of my said daughters or granddaughters, or at any time thereafter, shall ever be either actually, nominally or practically or practically an executor, administrator or trustee for the management or control of my estate, or of any part of the property thereof, or hold any position, authority or employment as a manager, representative, or agent in the control or management of the property or any part thereof; or of any business or interest connected with the same or related thereto.

Item 16th

I hereby nominate, constitute and appoint my said long tried friends, Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, all of said State and County, Executors of this my Last Will and Testament. [fol. 41] They shall not be required to make any inventory or appraisement of the property of my estate, nor to have the same made by others, excepting only such as shall be made voluntarily by them to be entered on their private records for the information of themselves and of the beneficiaries under this Will. Nor shall the said Executors be required any bond, or to make any return of or concerning the property of my said estate, or the disposition or management of the same or of its revenues, or any other returns of any kind whatsoever to any court, officer or authority whatsoever.

In witness whereof I, the said Augustus Octavius Bacon, at Macon Georgia on this the twenty eighth day of March

in the year Nineteen hundred and eleven, to the foregoing thirty two pages written with my own hand, and containing my last Will and Testament, do hereby set my hand and affix my seal in the presence of the attesting witnesses, hereunto subscribing as such by my request.

/s/ AUGUSTUS OCTAVIUS BACON (Seal)

Signed, Sealed, Declared and Published by Augustus Octavius Bacon as his last Will and Testament in the presence of the undersigned who, each of us, at his request, subscribed our names as witnesses thereto in the presence of said Testator and in the presence of each other—this the twenty eighth day of March, in the year Nineteen hundred and eleven; the words “including both that held by me in trust, and that held in fee simple,” when they occur on the fourth page, and the word “authority,” when it occurs on the tenth page, having been in each instance interlined before signing.

[fol. 42]

/s/ J. M. HANCOCK

/s/ SIDNEY W. HATCHER

/s/ WALTER DEFORE

[fol. 43]

EXHIBIT “B” TO PETITION

C O D I C I L

City of Washington
District of Columbia

I, Augustus Octavius Bacon, of the State of Georgia and County of Bibb and now temporarily sojourning at Washington in the District of Columbia, being of sound and disposing mind and Memory, do hereby make, declare and publish this first codicil to my last Will and Testament heretofore made, published, and declared by me on the 28th day of March 1911.

Item 1st

I revoke so much of the second item of my said Will as directs that my body shall be interred in the cemetery lot recently purchased by me, and also that part in said item which directs that the bodies of my two deceased sons shall be disinterred and reinterred in said lot.

Item 2nd

I revoke so much of my said Will as nominates and appoints Warren Roberts as a trustee under the same, and also so much thereof as nominates and appoints the said Warren Roberts as Executor of my said Will, and in his stead I hereby nominate and appoint my tried and trusted friend Minter Wimberly of said County of Bibb, both as Trustee under my said Will and as executor thereof; hereby expressly conferring upon the said Minter Wimberly, both as said trustee and as said executor, all the powers, privi-[fol. 44] leges, rights, immunities and exemptions heretofore conferred in said Will upon the said Warren Roberts, both as Trustee and as Executor as aforesaid.

Item 3rd

My beloved daughter, Augusta Lamar Bacon Curry, having died, it is my Will and I hereby direct that her children, Shirley Holcomb Curry, Marie Louise Lamar Curry and Manly Lamar Bacon Curry, shall in the disposition of my property, stand in the place of their Mother, and that the interest in my estate which she would have taken under my said Will shall, upon my death, enure to them and be held in trust for them and each of them in the same manner and to the same extent and subject to the same trusts, limitations, conditions and remainders as they would have taken under the provisions of my said Will had my daughter Augusta survived me and had they upon her subsequent death taken the same remainder interests prescribed for them in my said Will, and my said trustees shall hold said interests for them with the same trusts, limitations and conditions as are prescribed for them in

my said Will; but subject nevertheless to the following additional provisions, limitations and remainders, to-wit: The interest as aforesaid of each of said children shall enure to and be enjoyed by each for and during the period of his or her natural life respectively; and if either of said children of my daughter Augusta shall die leaving no child or children in life, the interest of said child so dying shall [fol. 45] enure to and be enjoyed by the surviving child or children of my daughter Augusta in the estates and with the same remainders as are herein prescribed for the original interest so received by each of them respectively. In making provisions for the children of my daughter Augusta I am not unmindful of the fact that part of the property thus generally devised is held by me in trust for my wife and children; but as the property thus held by me in trust is less than one-half of the aggregate of the property held by me both in trust and in my own right, the division herein directed thus generally, can be made without violation the terms of said trust. To prevent possibility of misconstruction I hereby prescribe and declare that all interest of the said children of my said daughter Augusta in the property specified in Item 9 of my said Will and in the rents, issues and profits thereof, shall cease, end and determine upon the death of my wife Virginia Lamar Bacon and of my daughter Mary Louise Bacon Sparks.

Item 4th

I direct that the said Custis Nottingham shall with his family continue to occupy free of rent the house now occupied by him at Baconsfield until the full experation and execution of the trusts for the preservation and execution of which I have in my said Will and in this Codicil appointed the said Alexander Lawton Miller, Custis Nottingham, R. C. Jordan and Minter Wimberly as Trustees as aforesaid; this provision being made in consideration of the personal interest in and care for said trust property and said cestui que trusts by said Nottingham.

[fol. 46]

Item 5th

Except as herein modified and changed by this first Codicil, I do again hereby make, declare and publish my said last Will and Testament heretofore made, declared and published by me on the 28th day of March, 1911.

In witness whereof I, the said Augustus Octavius Bacon, at Washington in the District of Columbia on this the sixth day of September (1913) Nineteen hundred and thirteen to the foregoing four and one half pages written with my own hand and containing this first Codicil to my said last Will and Testament, do hereunto set my hand and affix my seal in the presence of the attesting witnesses hereunto subscribing as such at my request.

/s/ AUGUSTUS OCTAVIUS BACON (Seal)

Signed, sealed, declared and published by Augustus Octavius Bacon as the first Codicil to his last Will and Testament in the presence of the undersigned, who each of us, at his request, have subscribed our names as witnesses thereto in the presence of the said Testator and in the presence of each other, this the Sixth day of September (1913) Nineteen hundred and thirteen.

/s/ JNO. T. BOIFFUILLET

/s/ JAMES L. FORT

/s/ EARL B. WILLIAMS

[File endorsement omitted]

[fol. 47]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

ANSWER OF DEFENDANT, CITY OF MACON—

Filed May 20, 1963

Comes now the City of Macon, one of the defendants named in this action and files this answer to plaintiffs' petition, and shows:

1.

This defendant admits paragraphs one and two of plaintiff's petition.

2.

This defendant denies paragraph three of the petition, as pleaded, but admits that the defendant is a municipality duly created by the Legislature of the State of Georgia and that this defendant holds the legal and equitable title to the property in question, subject to the provisions of Item 1X of the last will and testament of Augustus Octavius Bacon.

3.

On information and belief, this defendant admits paragraph four of the petition.

4.

This defendant admits paragraphs five, six and seven of the petition.

5.

This defendant denies paragraph eight of the petition as pleaded. The said will attached to the petition speaks for

itself and is subject to interpretation and construction by this court.

[fol. 48]

6.

This defendant can neither admit nor deny paragraph nine of the petition, but, on information and belief, admits that subject property has been used exclusively by white persons.

7.

This defendant denies paragraph ten as pleaded. However, this defendant admits that large numbers of Negro citizens have gone upon the subject property and used the same for various recreational activities during the past few weeks, and the City of Macon further admits that the use of the subject property by said members of the Negro race is not in conformity with the expressed intentions of said testator as contained in Item 1X of the aforesaid will. Further, the City of Macon alleges that it has no authority to enforce racially discriminatory restrictions with regard to property held in fee simple or as trustee for a private or public trust and, as a matter of law, is prohibited from enforcing such racially discriminatory restrictions.

8.

This defendant admits the first sentence of paragraph eleven, but denies the remaining portion of said paragraph as pleaded.

9.

Defendant denies paragraph twelve of plaintiffs' petition.

10.

This defendant neither admits nor denies paragraph thirteen of plaintiffs' petition since no answer is required.

[fol. 49] For further plea and answer this defendant shows:

11.

The City of Macon cannot legally enforce racial segregation of the property known as Baconsfield and, therefore, is unable to comply with the specific intention of the said testator with regard to maintaining the property for the exclusive use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon; neither can the City convey said property to private individuals, either for or without consideration, in order to carry out the said specific intention of the said testator.

W H E R E F O R E :

This defendant prays that this honorable court construe the last will and testament of the late Augustus Octavius Bacon and enter a decree setting forth the duties and obligations of the City of Macon in the premises and give such directions as the court deems proper, just and equitable.

Buckner F. Melton, 305 Persons Building, Macon, Georgia, Attorney for Defendant, City of Macon.

Duly sworn to by Edgar H. Wilson, jurat omitted in printing.

[fol. 50] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 51]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

ANSWER OF DEFENDANTS GUYTON G. ABNEY, J. D. CRUMP, T. I. DENMARK, AND DR. W. G. LEE, AS SUCCESSOR TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF AUGUSTUS OCTAVIUS BACON, DECEASED—Filed May 27, 1963

Come now Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased,

named among others as defendants in the above captioned matter, and answering said petition, respectfully show:

1.

These respondents admit the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of said petition.

2.

Further answering said petition, these respondents, without waiving any of the rights, title or interest vested in them under said Last Will and Testament, join in each and every prayer of said petition and, without limiting the generality of the foregoing, pray that the City of Macon be removed as trustee of the charitable trust created in said Last Will and Testament and Codicil of Augustus Octavius Bacon, deceased.

Jones, Sparks, Benton & Cork, Attorneys for respondents Guyton G. Abney, J. D. Crump, T. I. Den-[fol. 52] mark and Dr. W. G. Lee, As successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased.

Duly sworn to by Guyton G. Abney, jurat omitted in printing.

[fol. 53] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 54]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

MOTION FOR SUMMARY JUDGMENT—Filed May 27, 1963

Come now C. E. Newton, Frank M. Willingham, Mrs. Francis K. Hall, Mrs. Kenneth W. Dunwody, Mr. George P. Ranking, Jr., Mrs. Frederick W. Williams and Mrs. T. J.

Stewart, petitioners in the foregoing matter and make this motion for a summary judgment, and respectfully show:

1.

There is no genuine issue as to any material fact and your petitioners are entitled to a judgment as a matter of law.

Wherefore, your petitioners pray that this their motion for summary judgment be granted and that they have such other and further relief as the Court may deem fit and proper.

Jones, Sparks, Benton & Cork, Attorneys for petitioners.

Certificate of service (omitted in printing).

[fol. 55] [File endorsement omitted]

[fol. 56]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

MOTION OF REV. E. S. EVANS, ET AL. TO INTERVENE—

Filed May 29, 1963

Come now, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and move this Honorable Court for leave to file a petition of intervention in the above-styled action, and for grounds show as follows:

1.

That the property which is the subject matter of the captioned action is presently used as a public park in the City of Macon.

2.

The movants, being Negro residents of the City of Macon, and all other Negroes similarly situated, are subject to being irreparably harmed and damaged, in that, they are subject to being deprived of the use of said park if the prayers of the plaintiffs are sustained and a judgment is rendered in their favor.

3.

That the interests and welfare of the movants will be directly affected by the outcome of said suit, but there are no parties to the subject action who are or can adequately protect the legal rights and interests of the movants or the class which they represent, in that, some of the interests of the defendants and the movants are not only different but are, to some extent, adverse.

[fol. 57]

4.

Wherefore, movants pray that:

- (a) This motion be allowed;
- (b) That movants be granted leave to file their intervenors' petition in the above-captioned action;
- (c) That all of the proceedings in the instant case be held in abeyance pending the filing of the intervenors' pleadings;
- (d) That movants be granted thirty (30) days in which to file their pleadings in the captioned action.

This 26th day of May, 1963.

Donald L. Hollowell, Counsel for Movants.

859½ Hunter St., N. W., Atlanta 14, Georgia, Ja. 5-8372.

[fol. 58]

ORDER—May 28, 1963

Motion read and considered, let the same be filed.

It Is Hereby Ordered that the movants be, and they are granted leave to file their pleadings of intervention in the subject action within (20) Twenty days from the date of this order. All other proceedings in this action are hereby continued pending the filing of said pleadings within the time specified.

This 28 day of May, 1963.

O. L. Long, Judge, Bibb Superior Court.

[File endorsement omitted]

[fol. 59]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

Bill in Equity

No. 25864

[Title omitted]

INTERVENORS' PETITION—Filed June 18, 1963

Comes now, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, who file this their intervention to the claim for relief of the plaintiffs, in their individual capacities and as they constitute the Board of Managers of Baconsfield, and show as follows:

1.

That the intervenors are Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and are citizens of the United States of America and of the State of Georgia. Intervenors are domiciliaries and residents of Bibb County, Georgia, and of the City of Macon, Georgia. Each of the

intervenors is a member of the Negro race and bring this petition of intervention on behalf of themselves and other Negroes similarly situated as a class.

2.

That the present parties defendant, as named and designated in the petition, cannot adequately represent and assert the interest of the intervenors. For the intervenors seek to have Baconsfield Park operated upon an integrated basis and the present parties defendant have an interest in continuing to operate the said park upon a desegregated [fol. 60] basis according to Item 9 of the Will of Augustus Octavius Bacon which is attached to the plaintiffs' petition, marked "Exhibit 2", and thereby incorporated herein by reference.

3.

That any judgment, final order, or decree entered in the captioned action would be binding upon the intervenors and thus prejudicial to them.

4.

That by the Will of Augustus Octavius Bacon, the real property described in Item 9 became vested in the City of Macon in fee simple absolute upon the death of the testator and certain of his devisees and legatees under his will and codicil.

5.

That the Board of Managers charged by the Will with the obligation to control, maintain, and regulate Baconsfield Park is an agency of the City of Macon. Said Board of Managers having become such by the City of Macon having appointed and having designated its members from the date of creation of the park, until the present time, and by the City of Macon having adopted the Acts and Resolutions of said Board and by having acquiesced in the same.

6.

That the restriction and limitation reserving the use and enjoyment of the devise, legacy, and bequest of Bacons-field Park to the City of Macon to "White women, white girls, white boys and white children of the City of Macon," is violative of the public policy of the United States of America, treaties and other international obligations of the [fol. 61] United States and violative of the Constitution and laws of the State of Georgia. The public policy of the United States and of the State of Georgia being that no citizen is to be deprived of the use, benefit, and enjoyment of any publicly owned or supported facility solely because of his race, national origin, creed, or religion.

7.

That this Honorable Court, as an agency of the State of Georgia, cannot consistently with the equal protection clauses of the Fourteenth Amendment of the United States Constitution and the equivalent provisions of the Constitution of the State of Georgia, enter an order, as a court of equity, appointing three (3) freeholders, residents of the City of Macon, to serve as successor trustees, who in such capacity as trustees could operate and maintain Bacons-field Park upon a segregated basis; that is, the use and enjoyment of the same being limited and restricted to "white women, white girls, white boys and white children of the City of Macon." Such an order appointing private citizens as trustees for the manifest and express purpose of operating, managing, and regulating public property which passed to the City of Macon under a charitable trust created by will in a racially discriminatory manner, is violative of the Fourteenth Amendment to the United States Constitution and of the equivalent provisions of the Constitution of the State of Georgia.

[fol. 62] For a Second Answer and Defense

8.

That at the time the said will was probated and the real property known as Baconsfield Park passed to the City of Macon, the law of the land and of the State of Georgia as expressed and stated in the case of *Plessy v. Ferguson*, 163 U. S. 537, and decisions of the courts of this state and the laws of the State of Georgia consistent therewith permitted a racially restrictive condition and limitation imposed upon a public charitable trust to be enforced by the courts of the state wherein the trust was located. Since that time, the law of the land as reflected in the cases of *Brown v. Board of Education*, 347 U. S. 483, and the *Memphis Park Case* (decided in the United States Supreme Court May 27, 1963), and in decisions and judgments of the courts of this State and the laws consistent therewith, has changed. That is, discrimination based solely upon race is no longer a permissible object of state action whether such action is that of an administrative agency, the state executive officers and employees, the state legislature, or of the state courts.

9.

That, although the charitable legacy, device, and bequest at the time of its creation was capable of being executed in the exact manner provided for in the will of the testator, by operation of law it is no longer capable of further execution in the exact manner provided for by the testator, Augustus Octavius Bacon. That this Court (sitting in equity) effectuate the general charitable purpose of the testator to establish and endow a public park within the [fol. 63] City of Macon by refusing to appoint private persons as trustees of the said Baconsfield Park.

10.

That the plaintiffs as they appear by name and designation in the petition, are not proper parties to maintain a petition for the removal and appointment of trustees of a

public charitable trust as it does not appear that they have the requisite authority as required by law nor the requisite capacity and standing as required by law.

11.

That the plaintiffs, the named individuals and the Board of Managers do not come into this Court with clean hands. The plaintiffs seek judicial sanction of their alleged and avowed intent, design, and purpose to have private persons appointed in their place and stead as trustees, managers of Baconsfield Park, so that the said Baconsfield Park may be operated in violation and degradation of the constitutional rights of the intervenors.

Wherefore, the intervenors respectfully pray that they may have judgment against the petitioners with costs upon the petitioners.

Donald L. Hollowell, Horace T. Ward, Counsel for Intervenors.

Howard Moore, Jr., Of Counsel.

[fol. 64] June 14, 1963.

Certificates of service (omitted in printing).

[File endorsement omitted]

—
[fol. 65]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO PLAINTIFFS' PETITION—
Filed January 8, 1964

Come now the plaintiffs in the above styled case and by leave of the Court first had and obtained, amend their petition as follows:

1.

By adding thereto a paragraph "14" to read as follows: "since the time when the original petition was filed, an intervention has been filed on behalf of certain negro residents of Macon, Bibb County, Georgia, to-wit: Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone. That intervention was filed on behalf of the above named parties and on behalf of 'other Negroes similarly situated' as a class".

2.

By adding thereto paragraph "15" to read as follows; "Plaintiffs show that by the phrase 'other Negroes similarly situated' the intervenors encompass all Negro residents of Macon, Bibb County, Georgia. Plaintiffs show that each and every one of the intervenors named in the above paragraph plus each and every member of the Negro race resident in Macon, Bibb County, Georgia, as the class represented should be permanently enjoined from entering the grounds of Baconsfield, using any of the facilities located thereon or in any other way interfering with plaintiffs in [fol. 66] their efforts to carry out the express testamentary wishes of A. O. Bacon relating to the classes of persons to be benefited by his grant of Baconsfield."

3.

By adding thereto a paragraph "16" to read as follows: "Plaintiffs show that a trust was established under the Will of A. O. Bacon for his heirs. The trust has been executed as regards four of his seven heirs now living and a distribution of property made to them. They are A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks. The interests of the remaining three heirs, i.e. Louise Curry Williams, Shirley Curry Cheatham, and Manley Lamar Curry, are still held under an unexecuted trust by four trustees holding under the authority of the will, to-wit: Guyton Abney, J. D. Crump, T. I. Den-

mark and Dr. W. G. Lee. Plaintiff shows that these seven persons have a definite interest in the disposition of this litigation, since if the trust purpose expressed in the Will of A. O. Bacon with respect to the designation of persons who may use Baconsfield, fails, the property comprising Baconsfield together with property, the rentals of which provide the upkeep of Baconsfield, will revert and lapse into the estate of A. O. Bacon thence to be distributed to the above named heirs."

4.

By adding thereto a paragraph "17" to read as follows: "Plaintiffs show that there are no parties to this case with an interest identical to that of the Sparks heirs of A. O. Bacon such as to afford adequate representation to [fol. 67] the interests of the said heirs."

5.

By adding thereto a prayer to read as follows: "Plaintiffs pray that A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks be allowed to intervene and that Guyton Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee be allowed as Trustees to assert the interest of Louise Curry Williams, Shirley Curry Cheatham and Manley Lamar Curry."

6.

By adding thereto a prayer to read as follows: "Plaintiffs pray that each and every one of the intervenors named in paragraph one, plus each and every member of the Negro race resident in Macon, Bibb County, Georgia, as the class represented be permanently enjoined from entering the grounds of Baconsfield, using any of the facilities located thereon, or in any other way interfering with plaintiffs in their efforts to carry out the express testamentary wishes of A. O. Bacon relating to the classes of persons to be benefited by his grant of Baconsfield."

Wherefore, plaintiffs pray that their amendment be allowed.

Jones, Sparks, Benton & Cork, Attorneys for Plaintiffs.

ORDER—January 8, 1964

The within amendment being presented to me, it is allowed and ordered filed, subject to demurrer.

This the 8 day of January, 1964.

O. L. Long, J.S.C.M.C.

[fol. 68] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 69]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

PETITION FOR INTERVENTION—Filed January 8, 1964

The petition of A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks, respectfully shows to the court the following facts:

1.

Petitioners herein are grandchildren of the heirs of A. O. Bacon, deceased, being children of his deceased daughter, Mary Louise Bacon Sparks. The widow and only other child of the said A. O. Bacon who survived him are now deceased.

2.

Petitioners have an interest in the subject matter of the above styled case, since if the trust purpose expressed in

the Will of A. O. Bacon, including the restriction of the use of Baconsfield Park to white persons, is not carried out, the property will lapse into the Estate of A. O. Bacon, ultimately to be distributed to his heirs.

3.

Petitioners show that there is no party presently before the Court to represent their said interest.

4.

Petitioners present the following requests for relief praying that:

- (a) They be allowed to intervene and be heard.
- (b) That all of the prayers of plaintiffs, the Board of Managers of Baconsfield, be granted.
- [fol. 70] (c) That each and all of the Negro intervenors and all of those whom they represent be permanently enjoined from entering Baconsfield Park or from in any way interfering with the Board's management of the Park for the use and benefit of white persons only.

5.

Further, petitioners emphasize beyond all chance for doubt that their desire is that the above enumerated prayers be granted, that the City of Macon be replaced as Trustee and that such other and further relief be granted by this Court as will insure that Baconsfield Park will continue to be operated in strict accordance with the Will of A. O. Bacon. It is the most fervent hope of intervenors that Baconsfield will remain as a memorial to the memory of the infant sons of A. O. Bacon and as a park for the benefit of the white boys, white girls and white women of Macon, Georgia, under the direction of the plaintiff Board of Managers.

6.

Petitioners further pray that if this Court does not enter an order in this case effectuating the continued administration of Baconsfield in accordance with the Will of A. O. Bacon for the sole benefit of white persons, **That in that event,—And Only In That Event**—this honorable Court decree that the trust purpose having failed, the property included in Baconsfield and that property, the rental of which had supplied the income for the upkeep of Baconsfield, both be held to revert and lapse into the estate by operation of law.

Jones, Sparks, Benton & Cork, Attorneys for Petitioners.

[fol. 71]

ORDER—January 8, 1964

The within petition for intervention being presented to me, it is allowed and ordered filed, subject to demurrer.

This the 8 day of January, 1964.

O. L. Long, J. S. C. M. C.

Certificate and acknowledgment of service (omitted in printing).

[File endorsement omitted]

[fol. 72]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO ANSWER AND CROSS BILL—

Filed January 8, 1964

Come now Guyton Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee, defendants in the above styled case, and

by leave of the Court first had and obtained amend their answer as follows:

1.

By adding a paragraph 3 to read as follows: "These defendants are Trustees under the Will of A. O. Bacon for the benefit of certain of his heirs, to-wit: Louise Curry Williams, Shirley Curry Cheatham and Manley Lamar Curry. A similar trust has become executed with respect to certain other heirs, to-wit: A. O. B. Sparks, W. B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks, but the trust with respect to the first named group of heirs, which shall hereinafter be referred to as the 'Curry Heirs', has not become executed."

2.

By adding a paragraph 4 to read as follows: "defendants show that the Curry Heirs have an interest in the subject matter of the above styled case, since if the trust purpose expressed in the Will of A. O. Bacon, including the restriction of the use of Baconsfield to white persons, is not carried out, the property will lapse into the Estate of A. O. Bacon, ultimately to be distributed to his heirs."

[fol. 73]

3.

By adding by way of a cross bill the following prayer: "Defendants as such Trustees and on behalf of the said Curry heirs present the following requests for relief praying:

- (a) That they be allowed to assert the interest of the Curry heirs.
- (b) That all of the prayers of plaintiffs, the Board of Managers of Baconsfield, be granted.
- (c) That each and all of the Negro intervenors and all of those whom they represent be permanently enjoined from entering Baconsfield or from in any way inter-

fering with the Board's management of Baconsfield for the use and benefit of white persons only."

4.

By adding a paragraph to read as follows: "Further, defendants as such Trustees and on behalf of the Curry heirs emphasize beyond all chance for doubt that the desire of the Curry heirs is that the above enumerated prayers be granted, that the City of Macon be replaced as Trustee and that such other and further relief be granted by this Court as will insure that Baconsfield will continue to be operated in strict accordance with the Will of A. O. Bacon. It is the most fervent hope of the Curry heirs that Baconsfield will remain as a memorial to the memory of the infant sons of A. O. Bacon and as a park for the benefit of the white boys, white girls and white women of Macon, Georgia, under the direction of the plaintiff Board of Managers."

[fol. 74]

5.

By adding by way of cross bill the following prayer: "Defendants as such Trustees and on behalf of the Curry heirs further pray that if this Court does not enter an order in this case effectuating the continued administration of Baconsfield in accordance with the Will of A. O. Bacon for the sole benefit of white persons, that in that event,—And Only In That Event—this honorable Court decree that the trust purpose having failed, the property included in Baconsfield and that property, the rental of which had supplied the income for the upkeep of Baconsfield, both be held to revert and lapse into the estate by operation of law."

Jones, Sparks, Benton & Cork, Attorneys for the aforementioned Trustees.

ORDER—January 8, 1964

The within Amendment to Answer and Cross Bill being presented to me, it is allowed and ordered filed, subject to demurrer.

This the 8 day of January, 1964.

O. L. Long, J.S.C.M.C.

[fol. 75] Certificate and acknowledgment of service
(omitted in printing).

[File endorsement omitted]

[fol. 76]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO ANSWER OF CITY OF MACON—
Filed February 5, 1964

Comes now the City of Macon, defendant in the above stated case, and by leave of the Court first had and obtained amends its answer heretofore filed and respectfully shows:

1.

Pursuant to a resolution adopted by the Mayor and Council of the City of Macon at its regular meeting on February 4, 1964, a copy of which is hereto attached marked Exhibit A, the City of Macon acting through its Mayor and Clerk has resigned as Trustee under Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon, a copy of said resignation being hereto attached marked Exhibit B.

2.

Upon the acceptance of said resignation by this Court and the appointment of new Trustees to serve in lieu of the City of Macon, if this Court sees fit to appoint such new Trustees, the City of Macon will have no further duties to perform as such Trustee and will no longer be a necessary or proper party in said case.

Wherefore, defendant prays:

(1) That this amendment be allowed and ordered filed as part of the record in said case;

[fol. 77] (2) That the resignation of the City of Macon as Trustee under the Will of Senator Augustus Octavius Bacon be accepted, and that the Court take such further action in the premises as to the Court may seem meet and proper;

(3) That defendant be hence discharged.

Trammell F. Shi, City Attorney.

ORDER

The foregoing amendment allowed and ordered filed.

This February 5, 1964.

O. L. Long, J.S.C.M.C.

Certificates of service (omitted in printing).

[fol. 79]

EXHIBIT "A" TO AMENDMENT TO ANSWER

RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF MACON ADOPTED FEBRUARY 4, 1964

WHEREAS, in Civil Action No. 25864, pending in the Superior Court of Bibb County, Georgia, captioned *Charles E. Newton, et al. vs. City of Macon, et al.* the defendant City of Macon has heretofore filed its answer admitting that it has not for some time prior to filing said answer carried out as Trustee all of the provisions of the trust established in Items 9th and 10th of the Last Will and Testament of the Late Senator Augustus Octavius Bacon with reference to the property known as Baconsfield, said Items 9th and 10th reading as follows:

"Item 9th

"I direct that there by said Trustees laid off and accurately defined and permanently marked by enduring

monuments, the following described part of my farm which is situated in part within and part without the corporate limits of the City of Macon, and known as 'Baconsfield,' the same to be set a part and dedicated to the purposes, uses and enjoyments as hereinafter more fully set forth and detailed. The said part of the property thus set apart is bounded as follows: There is on the Southeastern part of my said farm a four acre rectangular tract which formerly belonged to James Pepper, and which is commonly known as the 'Pepper Place' the same having been purchased and added to my farm, for this description, beginning at [fol. 80] the Southeastern corner of said rectangular tract, the boundary line of the property runs in a Northerly direction along the Eastern boundary line of said Pepper Place and thereafter in a direct prolongation of the same to a point nine hundred and sixty-three feet and five-tenths from the said starting point, thence in a slightly northwestern direction sixty-three feet and five-tenths, thence in a northerly direction three hundred and thirty-two feet across boulevard Baconfield to a point on the Western side of said Boulevard, thence three hundred and sixteen feet along the western border of said Boulevard to a point on the same immediately opposite the junction of said Boulevard and Gray Street, thence, in a direction a little West of North, twenty-four hundred and eighty feet to an elm tree, thence at right angles sixteen hundred and sixty-two feet to the bank of the Ocmulgee River, thence in a Southeasterly direction along the bank of said river thirty-three hundred and ninety-seven feet, thence in a direct line to the Southwest corner of the said Pepper lot, thence four hundred and thirty-seven feet along the Southern boundary line of said Pepper lot to the original starting point; the said metes and bounds of the said tract of land being correctly platted and defined on a map of the same hereto attached, made by H. D. Cutter and upon which for the purpose of identification, I have endorsed my original signa-

[fol. 81] ture. The larger part of the property thus described and bounded is a portion of a trust estate originating with me and created solely by me for the benefit of my wife and children during my life and for their benefit and use after my death in such estates and with such remainders as should be specified and directed by me in my last Will and Testament. For the purpose of carrying out fully the purpose and intent of the trust thus created, I hereby give, bequeath and devise the said property consisting of the tract of land hereinbefore described and bounded and platted on said map unto the said Trustees, viz. Alexander Lawton Miller, Custis Nottingham, Richard C. Jordan and Warren Roberts, in trust for the sole joint use, benefit and enjoyment of my wife, Virginia Lamar Bacon, and of my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, during the term of their natural lives, as follows: So long as they shall all live they shall be entitled to the equal enjoyment and use of the same including all revenues and profits in any way derived therefrom. When Mrs. Virginia Lamar Bacon shall die, the use, benefit and enjoyment of the entire property herein described and bounded shall belong to my two said daughters equally, including all revenues and profits in any way derived from the same, during the full term of their natural lives. Upon the death of either of my said daughters, [fol. 82] her interest in said property shall be enjoyed by her children and the survivors of them until the death of my last surviving daughter. Upon the death of my said wife and of each of my said daughters, and of the last survivors of them, the trust created in this property by this said Ninth Item of this Will in the said tract of land thus defined, bounded and platted shall cease, and thereafter shall close all interest and right of enjoyment of any person or persons whomsoever in said property except as hereinafter specified and provided, to-wit: When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon

Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers [fol. 83] hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. for the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all

needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person [fol. 84] or persons of either sex, who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property the white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield, beginning at the north Macon bridge and including the 'Pepper Place,' also all of said property lying on the river which is property classed as low lands, or river bottom; but in no event and under no circumstances shall any part of the property herein conveyed and bounded and [fol. 85] platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified. If it should be held that said property is subject to

taxation when devoted to such uses as a park or pleasure ground, I request that proper steps be taken to secure from the State of Georgia a perpetual release from all liability to taxation.

"I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

"I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefits and enjoyment of the white persons herein specified, by my gratitude to [fol. 86] and love of the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December 1884 and Augustus Octavius Bacon, Jr. who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated. I direct that said property during the lives of my said wife and my two said daughters shall continue to be known and designated as 'Baconsfield' and that after their death, it shall be forever and perpetually known as 'Baconsfield,' and shall be so designated in all matters, documents and papers relating thereto.

"While I make no restrictions, I request that the Managers will preserve on the property my present house residence, and the smaller house nearby which I

have personally occupied for so many years and which I have called 'The Hut' the said houses to be used to the best advantage, and in such localities on the property as may be most desirable, for the comfort, convenience and pleasure of the white women, girls, boys and children herein designated: and I trust that the [fol. 87] managers of said property may find it to the best interest of those who are to enjoy this property that there shall be perpetually preserved the present woods and trees upon the same. And I specifically direct that during the said trust estate in said property for the uses and benefit of my wife Virginia Lamar Bacon and of my two daughters Mary Louise Bacon Sparks, and Augusta Lamar Bacon Curry, neither the said residence house nor the said smaller house known as 'The Hut' shall be removed or destroyed or materially altered by addition or otherwise, but that the same during the entire terms of said trust estate for life, be carefully preserved in their present condition; and further that during the terms of said trust estates and during the lives of my said wife and my two said daughters, the woods and trees on said property be carefully preserved, and that on one of them be cut down or destroyed for any purpose whatsoever; and I further specifically provide and direct that the said trustees hereinbefore named and their successors shall not have power or authority to sell or otherwise alienate or dispose of the tract of land thus described, bounded and platted or any part thereof during the continuance of said trust or trusts or at any other time, under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby hereby expressly denied to them, and to all others."

[fol. 88]

"Item 10th

"To make still further provision for the preservation, management and improvement of the property set apart in the foregoing 9th Item of this Will as a park and pleasure grounds as aforesaid, I will and be-

queath to the Mayor and Council of the City of Macon, and to their successors, ten bonds of the Macon Railway and Light Co., each of said ten bonds being for \$1000.00 and in the aggregate being for \$10,000.00 and bearing interest at the rate of five per centum per annum, and at present in the custody of the The Riggs National Bank in Washington, D. C., the said bonds and all monies or things of value resulting and derived therefrom to be held by the said Mayor and Council of the City of Macon and their successors for the following trusts and uses, to-wit: So long as the property known and to be known perpetually as 'Baconsfield,' specified, bounded and described in the foregoing 9th Item of this Will, shall continue to be held in trust by the Trustees named in the said foregoing 9th Item and their successors for the use and beiefit of my said wife and my two said daughters, or either of them, until the said property shall vest in the Mayor and Council of the City of Macon to be held in trust for the purposes specified and for the uses directed in the said 9th Item. The said Mayor and Council of the City of Macon shall as said Trustees collect the semi-[fol. 89] annual interest which shall be paid on said bonds, and as promptly as practicable invest the same in interest bearing bonds to be added to and included in said trust fund; and the interest received on the additional bonds thus purchased, and from all other bonds additional thereto resulting from and accruing to said fund, shall in like manner be reinvesting in interest bearing bonds, so that all income from said fund or in any manner accuring to said fund shall as far as practicable be semi-annually compounded and added to the principal of the original fund. When the said 9th Item and their cussessors shall cease to hold said property in trust for my said wife and my said daughters, as provided in the said 9th Item, and when as therein provided, the Mayor and Council of the City of Macon shall as Trustees be vested with said property and the title to the same for the uses therein set

forth, they shall as may be required for the preservation, maintenance and improvement of said park and pleasure ground, pay over to the Board of Managers hereinbefore provided for, the income subsequently received from said trust fund constituted of and resulting from the said bonds; and all income derived from said property, and from said bonds, and the proceeds thereof, when not required for the needs of said park and pleasure ground, be added to the said principal fund, to the end that from increased income it may be in greater and ever increasing degree beautiful and developed and equipped for the benefit and enjoyment of those for whose pleasure and happiness it is designated. If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation. Should the Mayor and Council of the City of Macon at any time consent to do so, then I direct that they be authorized to receive the fund constituted of said bonds and all additions thereto and the proceeds thereof, and cover the same into the treasury of the City, in consideration of the perpetual obligation of the City to be evidenced by its bond or otherwise, to provide and pay over annually to the said Board of Managers an amount equal to five per centum interest [fol. 91] upon the sum thus covered into the treasury,

to be devoted by said Board to the uses hereinbefore specified. In making this bequest as expressed in this and the preceding item of my Will, I have been mindful to preserve the full use and enjoyment of the real estate to my wife and daughters during their natural lives, and also of the fact that the entire bequest in value represents a very much smaller proportion of my estate than would have been the share in it of my two sons had they lived. As there will be no one of my descendants who now bears my name by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community of which they once formed a happy part."

and,

WHEREAS, under certain decisions of the Federal courts the City of Macon has realized that it could not as a municipal corporation carry out all of said provisions; and

WHEREAS, the Mayor and Council deem it to be in the public interest that Baconsfield be operated and maintained for the benefit of the public rather than for private benefit or profit; and

WHEREAS, the Mayor and Council are greatly concerned [fol. 92] that if Baconsfield is not operated and maintained in accordance with all of the provisions of the Will of Senator Bacon, the property may revert to private persons who are heirs at law of or legatees under the Will of Senator Bacon, in which case Baconsfield would become commercial or residential property or property of a nature wherein no part of the public would have the enjoyment of the property contemplated by Senator Bacon; and

WHEREAS, the City is advised that the income producing property which the late Senator Bacon bequeathed in trust for the purpose of maintaining Baconsfield is sufficient for

that purpose and that if the Court decides to appoint new Trustees the park may be economically maintained by the Trustees in accordance with the expressed intentions of the late Senator Bacon, and at no cost to the City in connection with such operations and maintenance; and

WHEREAS, it is the considered opinion of the Mayor and Council that it is against good conscience for the City of Macon to continue to serve as Trustee under said Will under circumstances where as such Trustee it cannot carry out the plain and unambiguous terms of the trust; and

WHEREAS, in the light of the foregoing it is the considered opinion of the Mayor and Council that the City of Macon should forthwith resign as Trustee under the Will of Senator Bacon;

Now, THEREFORE, be it resolved by the Mayor and Council of the City of Macon, and it is hereby resolved, that the City of Macon forthwith resign as Trustee under the trust established in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

[fol. 93] RESOLVED FURTHER, that the Mayor and the Clerk of Council be authorized to sign in the name of the City of Macon a written resignation of such trust and deliver the same to Mr. Trammell F. Shi, City Attorney, with instructions to him to deliver it to the Superior Court of Bibb County, Georgia, in the litigation now pending instituted by the Board of Managers of Baconsfield, created in said Will, against the City of Macon and others.

[fol. 94]

EXHIBIT "B" TO AMENDMENT TO ANSWER

**RESIGNATION OF THE CITY OF MACON AS TRUSTEE
UNDER WILL OF SENATOR AUGUSTUS OCTAVIUS BACON**

Pursuant to a resolution adopted on the 4th day of February, 1964, by Mayor and City Council of the City of Macon, the City of Macon hereby resigns as Trustee of the property known as Baconsfield under the trust estab-

lished in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

IN WITNESS WHEREOF, as directed in the aforesaid resolution, the City of Macon has caused these presents to be executed by the Mayor and the Clerk of Council and its seal affixed, this the 4th day of February, 1964.

THE CITY OF MACON

By B. F. Merritt, Jr.

Mayor of the City of Macon

Attest: Alex B. Cameron

Clerk of Council

City of Macon

(Seal of the City of Macon)

[File endorsement omitted]

[fol. 95]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

AMENDMENT TO INTERVENORS' PETITION—

Filed March 5, 1964

Comes now, the intervenors in the above-styled case, Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, and by leave of Court first had and obtained, amend their petition by adding thereto four additional paragraphs to be known as paragraphs 12, 13, 14, and 15, and a prayer, as follows:

12.

That the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits this Court from enjoining Negroes from use of the park.

13.

That the equal protection clause of the Fourteenth Amendment prohibits this Court from accepting the resignation of the City of Macon as trustee and appointing new trustees for the purpose of enjoining the racially discriminatory provision in the will of A. O. Bacon.

14.

That Georgia Code Annotated, Section 69-504 prescribes racial discrimination and is therefore violative of the equal [fol. 96] protection clause to the Fourteenth Amendment. Since the racially discriminatory provision in A. O. Bacon's will was dictated by that unconstitutional statute, enforcement of the racially discriminatory provision is constitutionally prohibited.

15.

Georgia Code Annotated, Section 108-202, properly construed, requires that the racially discriminatory provision in A. O. Bacon's will be declared null and void.

Wherefore, the intervenors respectfully pray that this Court withhold approval of the attempted resignation of the City of Macon as trustee under the will of A. O. Bacon, direct the City of Macon to continue to fulfill this paramount constitutional obligation to administer the park on a racially non-discriminatory basis, and deny the injunction sought by plaintiffs to exclude Negroes from use of the park.

Wherefore, the intervenors pray that this amendment be allowed.

Donald L. Hollowell, 859½ Hunter St., N. W., Atlanta, Georgia 30314, Attorney For Intervenors.

William H. Alexander, Of Counsel For Intervenors.

[fol. 97]

ORDER—March 5, 1964

The foregoing amendment read and considered,
It Is Ordered that the same be filed, subject to objections.
This 5 day of March, 1964.

O. L. Long, Judge, Superior Court, Macon Judicial Circuit.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 99]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

CHARLES E. NEWTON, ET AL.,

v.

CITY OF MACON, ET AL.

ORDER AND DECREE—March 10, 1964

The Motion for Summary Judgment filed in behalf of petitioners in the above captioned matter having come on regularly to be heard, and the Court having duly considered all pleadings filed in behalf of all parties to said cause and the briefs filed in behalf of petitioners and the intervenors Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, it is

Considered, Ordered and Adjudged as follows:

(1) The intervenors named above are proper parties to this case and are proper representatives of the class

which their intervention states they represent, to-wit, the negro citizens of Bibb County, Georgia, and the City of Macon, Georgia.

(2) The defendants Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, are also proper parties to the case, as are the intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks.

(3) The defendant the City of Macon having submitted its resignation as Trustee of the property described in the petition and known as Baconsfield, said resignation is here-
[fol. 100] by accepted by the Court.

(4) Under the principle that a trust shall not fail for want of a trustee it becomes the duty of this Court to appoint new trustees to serve in lieu of the City of Macon; and the following, all being citizens and residents of Bibb County, Georgia, are hereby appointed as Trustees, to-wit, Hugh M. Comer, Lawton Miller and B. L. Register.

(5) The Court hereby retains jurisdiction for the purpose of appointing another trustee or trustees in the event any of the persons named above fails to accept his appointment or in the event of the future death, incompetency or other cause whereby any or all of such Trustees fail or cease to act as such.

(6) Since the relief herein granted is also that primarily sought by the defendants Guyton G. Abney, et al., as Trustees under the Last Will and Testament of Augustus Octavius Bacon and by intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks, it is therefore unnecessary to pass upon and the Court does not pass upon the secondary contentions outlined in paragraph 5 of the amendment to the answer and cross bill filed by Guyton G. Abney, et al., as Trustees and in paragraph 6 of the petition for intervention filed by the above named intervening heirs.

So Ordered, this the 10 day of March, 1964.

O. L. Long, J.S.C.M.C.

[File endorsement omitted]

[fol. 101]

ATTACHMENT TO ORDER

**RESIGNATION OF THE CITY OF MACON AS TRUSTEE
UNDER WILL OF SENATOR AUGUSTUS OCTAVIUS BACON**

Pursuant to a resolution adopted on the 4th day of February, 1964, by Mayor and City Council of the City of Macon, the City of Macon hereby resigns as Trustee of the property known as Baconsfield under the trust established in Items 9th and 10th of the Will of the late Senator Augustus Octavius Bacon.

IN WITNESS WHEREOF, as directed in the aforesaid resolution, the City of Macon has caused these presents to be executed by the Mayor and the Clerk of Council and its seal affixed, this the 4th day of February, 1964.

THE CITY OF MACON

**By B. F. Merritt, Jr.
Mayor of the City of Macon**

**Attest: Alex B. Cameron
Clerk of Council
City of Macon**

(Seal of the City of Macon)

**FILED IN OFFICE
5 day of Feb. 1964
Era B. Goodner
Deputy Clerk**

[fol. 102]

IN THE SUPERIOR COURT, BIBB COUNTY, GEORGIA

No. 25864

Bill in Equity

[Title omitted]

ACCEPTANCE OF TRUST—Filed March 12, 1964

Come now the undersigned, Hugh M. Comer, Lawton Miller and B. L. Register, and pursuant to the Order and Decree of Honorable O. L. Long, Judge, Superior Courts, Macon Circuit, dated March 10, 1964, hereby formally accept their appointment as successor Trustees under Items IX and X of the Last Will and Testament of Augustus Octavius Bacon, Deceased.

This 11th day of March, 1964.

Hugh M. Comer, Lawton Miller, B. L. Register.

[File endorsement omitted]

[fol. 103] Clerk's Certificate to foregoing transcript
(omitted in printing). —

[fol. 105]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

REV. E. S. EVANS, et al., Plaintiffs-in-error,

—vs.—

CHARLES E. NEWTON, et al., Defendants-in-error.

MOTION TO AMEND BILL OF EXCEPTIONS—

Filed May 8, 1964

To the Honorable Chief Justice and the Honorable Justices
of the Supreme Court of Georgia:

Comes now the plaintiffs-in-error, Rev. E. S. Evans,
et al. in the above-styled case which is before this Honor-

able Court by virtue of being an equity action from the Superior Court of Bibb County, who with leave of Court, and pursuant to Georgia Code Annotated, Sections 6-913, 6-1309, 6-1401, and 81-1301, amend page one (1) of their bill of exceptions by striking the designation of plaintiffs-in-error and defendants-in-error, respectively, and substituting therefor the following:

**Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key,
Rev. Booker W. Chambers, William Randall, and
Rev. Van J. Malone, Plaintiffs-in-error,**

—vs.—

**The City of Macon; A. O. B. Sparks, Willis B. Sparks,
Jr., Virginia Lamar Sparks, M. Barton Sparks,
Heirs at law of A. O. Bacon; Guyton Adley, J. D.
Crump, J. J. Denmark, Dr. W. G. Lee, Successor
Trustees under the Will of A. O. Bacon; Hugh M.
[fol. 106] Comer, Lawton Miller, and B. L. Register,
Successor Trustees in lieu of the City of Macon,
Defendants-in-error.**

Wherefore, plaintiffs-in-error pray that this their amendment be allowed.

Donald L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-Error.

[fol. 107] Certificate of Service (omitted in printing).

[fol. 108]

ORDER

The foregoing Amendment having been read and considered, the same is allowed and ordered filed.

-----, Justice, Supreme Court of Georgia.

[fol. 109] [File endorsement omitted]

[fol. 110]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

[Title omitted]

SECOND MOTION TO AMEND BILL OF EXCEPTIONS—

Filed May 18, 1964

To the Honorable Chief Justice and the Honorable Justices
of the Supreme Court of Georgia:

Comes now the plaintiffs-in-error, Rev. E. S. Evans,
et al. in the above-styled case which is before this Honorable
Court by virtue of being an equity action from the Superior
Court of Bibb County, who with leave of Court,
and pursuant to Georgia Code Annotated, Sections 6-913,
6-1309, 6-1401, and 81-1301, amend page one (1) of their
bill of exceptions by striking the designation of plaintiffs-
in-error and defendants-in-error, respectively, and substituting
therefor the following:

Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key,
Rev. Booker W. Chambers, William Randall, and
Rev. Van J. Malone, Plaintiffs-in-error,

—vs.—

The City of Macon; A. O. B. Sparks, Willis B. Sparks,
Jr., Virginia Lamar Sparks, M. Barton Sparks,
Heirs at law of A. O. Bacon; Guyton Adley, J. D.
Crump, J. J. Denmark, Dr. W. G. Lee, Successor
Trustees under the Will of A. O. Bacon; Charles
[fol. 111] Newton, Mrs. T. J. Stewart, Frank M.
Willingham, Mrs. Francis K. Hall, George P. Ran-
kin, Jr., Mrs. Frederic W. Williams, and Mrs. Ken-
neth Dunwoody, Members of the Board of Managers
under will of A. O. Bacon; Hugh M. Comer, Lawton
Miller, and B. L. Register, Successor Trustees in
lieu of the City of Macor, Defendants-in-error.

Wherefore, plaintiffs-in-error pray that this their amendment be allowed.

D. L. Hollowell, William H. Alexander, Attorneys for Plaintiffs-in-Error.

[fol. 112] Certificate of Service (omitted in printing).

[fol. 113]

ORDER

The foregoing Amendment having been read and considered, the same is allowed and ordered filed.

-----, Justice, Supreme Court of Georgia.

[fol. 114] [File endorsement omitted]

[fol. 115]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

[Title omitted]

**MOTION OF CHARLES E. NEWTON, ET AL. TO SUBSTITUTE
PARTIES DEFENDANT-IN-ERROR—Filed May 27, 1964**

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of Georgia:

Come now the defendants-in-error, Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody and for reasons which will hereinafter appear, pray that this Honorable Court substitute as parties defendant-in-error in place of Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody the four following named residents of Macon, Bibb County, Georgia:

A. M. Anderson
Mrs. Dan O'Callaghan
Mrs. R. A. McCord, Jr.
Mrs. W. E. Pendleton, Jr.

In support of this motion the movants respectfully show to this Court the following facts. After the Trial Court entered its order on March 10, 1964, appointing Hugh Comer, Lawton Miller and B. L. Register as Trustees of Baconsfield, movants herein tendered to these three new Trustees their resignations as members of the Board of Managers of Baconsfield. This joint resignation was submitted to the Trustees on March 18, 1964. [fol. 116]

Thereafter, on May 21, 1964, at a time when the record from the Trial Court had already been docketed in the Supreme Court of Georgia, a meeting was held at which the above named three Trustees formally accepted the resignations previously tendered to them and appointed a new Board of Managers to consist of the following persons:

A. M. Anderson
Mrs. Francis K. Hall
Mrs. R. A. McCord, Jr.
Mrs. Dan O'Callaghan
Mrs. W. E. Pendleton, Jr.
George P. Rankin, Jr.
Frank M. Willingham

These seven appointees thereupon accepted their appointments in writing.

A copy of the resignation of the members of the former Board of Managers is attached hereto as Exhibit "A". The acceptance of this resignation and the appointment of a new Board by the three Trustees and the acceptance of this appointment by the new Board of Managers is attached hereto as Exhibit "B". Movants hereby incorporate these two exhibits by reference.

Four of the seven positions on the Board of Managers are now filled by persons who did not serve on the Board as it was constituted at the time this case was docketed in

the Supreme Court of Georgia, and who have never served on the Board before.

Wherefore, movants pray that A. M. Anderson, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan and Mrs. W. E. [fol. 117] Pendleton, Jr. may be made parties defendant-in-error and that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody may be stricken as parties defendant-in-error.

Jones, Sparks, Benton & Cork, Attorneys for Defendants-in-Error, Board of Managers of Baconsfield.

Address of Counsel:

**1007 Persons Building, Macon, Georgia, SHerwood
5-2821.**

[fol. 118]

GEORGIA, BIBB COUNTY.

**ACKNOWLEDGMENT OF SERVICE, WAIVER AND CONSENT
BY NEW BOARD MEMBERS**

Come now A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and Mrs. W. E. Pendleton, Jr., and ask that they may be substituted as parties defendant in error in accordance with the attached motion of Charles E. Newton, et al., acknowledge service of the bill of exceptions, waive all further service and notice and consent that the case may proceed.

This 21st day of May, 1964.

**A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A.
McCord, Jr., Mrs. W. E. Pendleton, Jr.**

[fol. 119]

EXHIBIT "A" TO MOTION TO SUBSTITUTE PARTIES
DEFENDANT IN ERROR

GEORGIA, BIBB COUNTY.

RESIGNATION OF BOARD OF MANAGERS OF BACONSFIELD

Come now Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody, all of said State and County, in their respective capacities as members of the Board of Managers of Baconsfield and pursuant to the order of Honorable O. L. Long, Judge Superior Courts, Macon Circuit, dated March 10, 1964, the resignation of The City of Macon as Trustees under Items IX and X of the Last Will and Testament of Augustus Octavius Bacon, deceased, having been accepted; and three (3) individual Trustees having been appointed by the said Superior Court to serve in lieu of The City of Macon in said capacity, the undersigned do hereby tender to said Trustees their respective resignations as members of said Board of Managers of Baconsfield.

This 18th day of March, 1964.

/s/ CHARLES E. NEWTON, JR.

/s/ MRS. T. J. STEWART

/s/ FRANK M. WILLINGHAM

/s/ MRS. FRANCIS K. HALL

/s/ GEORGE P. RANKIN, JR.

/s/ MRS. FREDERICK W. WILLIAMS

/s/ MRS. KENNETH W. DUNWODY

[fol. 120]

**EXHIBIT "B" TO MOTION TO SUBSTITUTE PARTIES
DEFENDANT IN ERROR**

GEORGIA, BIBB COUNTY.

ACCEPTANCE OF RESIGNATION OF BOARD OF MANAGERS

Come now Hugh M. Comer, Lawton Miller and B. L. Register and after due consideration formally accept the resignation of Charles E. Newton, Frank M. Willingham, George P. Rankin, Jr., Mrs. Francis K. Hall, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwody from the Board of Managers of Baconsfield, such resignation being dated March 18, 1964.

This the 21st day of May, 1964.

/s/ **HUGH M. COMER**
Hugh M. Comer

/s/ **LAWTON MILLER**
Lawton Miller

/s/ **B. L. REGISTER**
B. L. Register

APPOINTMENT OF NEW BOARD OF MANAGERS

Further, we, the said Hugh M. Comer, Lawton Miller and B. L. Register hereby appoint to the Board of Managers of Baconsfield for terms of office to begin immediately, the following persons: A. M. Anderson, Mrs. Francis K. Hall, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, Mrs. W. E. Pendleton, Jr., George P. Rankin, Jr., and Frank M. Willingham.

This the 21st day of May, 1964.

/s/ **HUGH M. COMER**
Hugh M. Comer

/s/ **LAWTON MILLER**
Lawton Miller

/s/ **B. L. REGISTER**
B. L. Register

[fol. 121]

ACCEPTANCE OF APPOINTMENT BY NEW BOARD

Come now A. M. Anderson, Mrs. Francis K. Hall, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, Mrs. W. E. Pendleton, Jr., George P. Rankin, Jr., and Frank M. Willingham and accept appointment to the Board of Managers of Baconsfield for terms to begin immediately.

This the 21st day of May, 1964.

/s/ A. M. ANDERSON
A. M. Anderson

/s/ MRS. FRANCIS K. HALL
Mrs. Francis K. Hall

/s/ MRS. R. A. MCCORD, JR.
Mrs. R. A. McCord, Jr.

/s/ MRS. DAN O'CALLAGHAN
Mrs. Dan O'Callaghan

/s/ MRS. W. E. PENDLETON, JR.
Mrs. W. E. Pendleton, Jr.

/s/ GEORGE P. RANKIN, JR.
George P. Rankin, Jr.

/s/ FRANK M. WILLINGHAM
Frank M. Willingham

[fol. 122]

ORDER GRANTING MOTION TO SUBSTITUTE PARTIES

DEFENDANT, ETC.—June 6, 1964

The within motion having been presented to this Court and it being made to appear that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr. and Mrs. W. E. Pendleton, Jr. have consented to be made parties defendant in error and have acknowledged service of the bill of exceptions and have waived all further service and notice and have consented that the case may proceed:

Wherefore, It Is Hereby Ordered and Adjudged that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr. and Mrs. W. E. Pendleton, Jr. are made additional

parties defendant in error and that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwody are hereby stricken as parties defendant in error.

This the 6th day of June, 1964.

-----, Presiding Justice, Supreme
Court of Georgia.

[fol. 123]

Certificate of Service

Georgia, Bibb County.

I, Willis B. Sparks, III, of counsel of record for the defendants-in-error, the Members of the Board of Managers of Baconsfield, certify that I have served the foregoing motion and accompanying two exhibits and acknowledgment of service and waiver by the four new Board members and order upon the plaintiffs-in-error by mailing a copy of the same to their attorney of record, Donald L. Hollowell, at his office at 859½ Hunter Street, Northwest, Atlanta, Georgia.

I further certify that I have mailed a copy of all the above described documents to Mr. Jack Greenberg, 10 Columbus Circle, New York, New York, Mr. Greenberg appearing on the brief of the plaintiffs-in-error as co-counsel in the case.

I further certify that I have served the defendant-in-error, City of Macon, by mailing a copy of the said motion and the said two accompanying exhibits and the said acknowledgment of service and waiver by the four new Board members and order to its attorney of record, Trammell F. Shi, at his office in the Southern United Building in Macon, Georgia.

I acknowledge service on behalf of Guyton Abney, et al., as Successor Trustees under the Will of A. O. Bacon and I further acknowledge service for W. B. Sparks, Jr., et al., as the "Sparks heirs" of A. O. Bacon.

This the 26th day of May, 1964.

Willis B. Sparks, 3rd.

[fol. 124]

[File endorsement omitted]

[fol. 125]

IN THE SUPREME COURT OF THE STATE OF GEORGIA
Docket No. 22534

REV. E. S. EVANS, LOUIS H. WYNN, REV. J. L. KEY, REV.
BOOKER W. CHAMBERS, WILLIAM RANDALL, and REV. VAN
J. MALONE, Plaintiffs-in-Error,

vs.

THE CITY OF MACON: A. O. B. SPARKS, JR., VIRGINIA LAMAR
SPARKS, M. BARTON SPARKS, Heirs at Law of A. O.
BACON; GUYTON ADLEY, J. D. CRUMP, J. J. DENMARK,
DR. W. G. LEE, Successor Trustees under the Will of
A. O. BACON; CHARLES NEWTON, MRS. T. J. STEWART,
FRANK M. WILLINGHAM, MRS. FRANCIS K. HALL, GEORGE
P. RANKIN, JR., MRS. FREDERICK W. WILLIAMS, and MRS.
KENNETH DUNWOODY, Members of the Board of Man-
agers under Will of A. O. BACON; HUGH M. COMER,
LAWTON MILLER, and B. L. REGISTER, Successor Trustees
in Lieu of The City of Macon, Defendants-in-Error.

MOTION TO ADD PARTIES DEFENDANT-IN-ERROR AND TO DENY
DEFENDANTS-IN-ERROR'S MOTION TO SUBSTITUTE PARTIES
DEFENDANT-IN-ERROR—Filed June 4, 1964

To the Honorable Chief Justice and the Honorable Justice
of the Supreme Court of Georgia:

Come now the plaintiffs-in-error, Rev. E. S. Evans,
Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers,
William Randall, and Rev. Van J. Malone in the above-
styled case and pray that this Honorable Court add the fol-
lowing named persons as defendants-in-error: A. M. Ander-
son, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and
Mrs. W. E. Pendleton, Jr., and deny the defendants-in-
error's motion to substitute these named defendants-in-
error in lieu of defendants-in-error Charles E. Newton,
Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K.
Hall, for the following reasons:

[fol. 126] The said motion filed in this Honorable Court by defendants-in-error Charles E. Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwoody shows that they submitted their resignations as members of the Board of Managers of Baconsfield. This joint resignation was submitted to Hugh Comer, Lawton Miller, and B. L. Register, new trustees of Baconsfield, on March 18, 1964. The said resignations were accepted by the said Trustees on May 21, 1964. However, the appeal of this case to this Honorable Court by the plaintiffs-in-error was docketed in this Honorable Court on May 8, 1964. The said new trustees, having been notified that the appeal was docketed, had no authority to accept the resignation of the named defendants-in-error or to take any other action affecting the status of the parties or property involved in this case, pending a determination of the issues involved in this case by this Honorable Court. Therefore, plaintiffs-in-error submit that the attempted resignation by the named defendants-in-error was null and void.

Wherefore, plaintiffs-in-error pray that:

- (1) A. M. Anderson, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, and Mrs. W. E. Pendleton, Jr., be made parties defendants-in-error; and
- (2) The defendants-in-error's prayer that Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwoody be stricken as parties defendant-in-error, be denied.

Donald L. Hollowell, William H. Alexander, 859½
Hunter Street, Northwest, Atlanta, Georgia.

Jack Greenberg, James M. Nabrit, III, 10 Columbus
Circle, New York, New York 10019, Attorneys for
Plaintiffs-in-Error.

[fol. 127] Certificate of Service (omitted in printing).

[fol. 128]

ORDER

The foregoing motion having been read and considered, the same is allowed and ordered filed.

Wherefore, it is ordered and adjudged that A. M. Anderson, Mrs. Dan O'Callaghan, Mrs. R. A. McCord, Jr., and Mrs. W. E. Pendleton, Jr. are made parties defendant-in-error. Further, the motion of the defendants-in-error to strike Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams, and Mrs. Kenneth W. Dunwoody, referred to in this motion, is denied.

This the day of June, 1964.

..... Justice, Supreme Court of
Georgia.

[fol. 129] [File endorsement omitted]

[fol. 130]
IN THE SUPREME COURT OF THE STATE OF GEORGIA
Docket No. 22534

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

**ORDER GRANTING SECOND MOTION TO AMEND THE
BILL OF EXCEPTIONS, ETC.—September 25, 1964**

Upon consideration of the second motion to amend the bill of exceptions by E. S. Evans et al., the designated plaintiffs in error in this case, filed in the Supreme Court on May 18, 1964, so as to substitute the plaintiffs in error designated in the said motion for those designated in the bill of exceptions and to substitute the defendants in error designated in the said motion for those designated in the

bill of exceptions, it is ordered that the said motion be hereby granted.

Let a copy of this order be mailed to counsel for each side.

[fol. 131]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

ORDER GRANTING MOTION BY CHARLES E. NEWTON ET AL.,
DEFENDANTS IN ERROR, ETC.—September 28, 1964

Upon consideration of the motion by Charles E. Newton et al., defendants in error in this case, to make A. M. Anderson, Mrs. R. A. McCord, Mrs. Dan O'Callahan and Mrs. W. E. Pendleton, Jr., parties defendant in error and to strike Charles E. Newton, Mrs. T. J. Stewart, Mrs. Frederick W. Williams and Mrs. Kenneth W. Dunwoody as parties defendant in error, it is ordered that the said motion be granted in so far as it names additional parties defendant in error and is denied in so far as it seeks to strike parties defendant in error.

Let a certified copy of this order be mailed to counsel for each side.

[fol. 132]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Docket No. 22534

EVANS et al.,

v.

NEWTON et al.

The record does not support the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. The judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

- Argued June 8, 1964

Decided September 28, 1964

Rehearing denied October 8, 1964.

Equitable petition. Bibb Superior Court. Before Judge Long.

[fol. 133]

OPINION—September 28, 1964

The will of A. O. Bacon (which was probated in solemn form) in Item Nine gave in trust described property, to be known as "Baconsfield," to named trustees for the benefit of his wife and two named daughters for their joint use, benefit, and enjoyment during the term of their natural lives. It was provided that upon the death of the last survivor, the property, including all remainders and reversions, "shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever

used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control" of a board of managers consisting of seven persons, not less than four to be white women and all seven to be white persons. In order to provide for the maintenance of the park, income from described real property and bonds was to be expended by the board of managers.

Charles E. Newton and others, as members of the Board [fol. 134] of Managers of Baconsfield, brought an equitable petition against the City of Macon (in its capacity as trustee under Item Nine of the will of A. O. Bacon), and Guyton G. Abney and others, as successor trustees under the will holding assets for the benefit of certain residuary beneficiaries. It was alleged: The city as trustee holds the legal title to a tract of land in Macon, Bibb County, known as Baconsfield, under Item Nine of the will of A. O. Bacon. As directed in the will, the board through the years has confined the exclusive use of Baconsfield to those persons designated in the will. The city is now failing and refusing to enforce the provisions of the will with respect to the exclusive use of Baconsfield. Such conduct on the part of the city constitutes such a violation of trust as to require its removal as trustee. It was prayed that: the city be removed as a trustee under the will; the court enter a decree appointing one or more freeholders, residents of the city, to serve as trustee or trustees under the will; legal title to Baconsfield and any other assets held by the city as trustee be decreed to be in the trustee or trustees so appointed [fol. 135] for the uses originally declared by the testator; and for further relief.

The City of Macon filed its answer asserting that it can not legally enforce racial segregation of the property known as Baconsfield, and therefore it is unable to comply with the specific intention of the testator with regard to maintaining the property for the exclusive use, benefit, and enjoyment of the white women, white girls, white boys, and white children of the city. The city prayed that the court construe the will and enter a decree setting forth the duties and obligations of the city in the premises. The other

defendants admitted the allegations of the petition and prayed that the city be removed as a trustee. The petitioners thereafter filed a motion for summary judgment.

Reverend E. S. Evans and others, alleging themselves to be Negro residents of the City of Macon, on behalf of themselves and other Negroes similarly situated, filed an intervention in the cause and asserted: The restriction and limitation reserving the use and enjoyment of Baconsfield [fol. 136] Park to "white women, white girls, white boys and white children of the City of Macon," is violative of the public policy of the United States of America and violative of the Constitution and laws of the State of Georgia. The court as an agency of the State of Georgia can not, consistently with the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and the equivalent provision of the Constitution of the State of Georgia, enter an order appointing private citizens as trustees for the manifest purpose of operating, managing, and regulating public property (which passed to the City of Macon under charitable trust created by will) in a racially discriminatory manner. Although the charitable device at the time of its creation was capable of being executed in the exact manner provided by the will, by operation of law it is no longer capable of further execution in the exact manner provided for by the testator. The court should effectuate the general charitable purpose of the testator to establish and endow a public park by refusing to appoint private persons as trustees.

By amendment to the petition it was alleged: By the [fol. 137] will of A. O. Bacon a trust was established for his heirs. The trust has been executed as to four of his seven heirs now living, A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks. The interests of three remaining heirs, Louise Curry Williams, Shirley Curry Cheatham, and Manley Lamar Curry, are still held under an executed trust by four trustees holding under the authority of the will, these trustees being Guyton Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee. These seven persons have an interest in the litigation since,

if the trust purpose expressed in the will with respect to the designation of persons who may use Baconsfield should fail, the property comprising Baconsfield, together with the property providing the upkeep of Baconsfield, will revert to the estate of A. O. Bacon and be distributed to these heirs. The amendment prayed that the Sparks heirs be allowed to intervene and that the trustees be allowed to assert the interests of the other heirs. It was also prayed that the Negro intervenors and other members of the Negro race resident in Macon be permanently enjoined from entering [fol. 138] and using the facilities of Baconsfield. The Sparks heirs and the trustees of the other heirs of A. O. Bacon filed an intervention praying that the relief sought by the original petitioners be granted, but that if such relief not be granted, the property revert to them.

The City of Macon filed an amendment to its answer, alleging that pursuant to resolution adopted by the Mayor and Council of the city at its regular meeting on February 4, 1964, the city has resigned as trustee under the will of A. O. Bacon. It prayed that the resignation be accepted by the court.

The Negro intervenors filed an amendment to their intervention in which they asserted: The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits the court from enjoining Negroes from the use of the park, and from accepting the resignation of the City of Macon as trustee and appointing new trustees for the purpose of enjoining (enforcing?) the racially discriminatory provision in the will of A. O. Bacon. Code § 69-504 prescribes racial discrimination and is therefore [fol. 139] violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Since the racially discriminatory provision in the will was dictated by that unconstitutional statute, enforcement of the racially discriminatory provision is constitutionally prohibited. Code § 108-202, properly construed, requires that the racially discriminatory provision in the will be declared null and void. The intervenors prayed that the court withhold approval of the attempted resignation of the city as

trustee under the will, direct the city to continue to administer the park on a racially nondiscriminatory basis, and deny the injunction sought by the petitioners to exclude Negroes from the use of the park.

On March 10, 1964, the judge of the superior court entered an order and decree in the case which adjudged as follows: (1) The intervenors named are proper parties in the case and are proper representatives of the class which their intervention states that they represent, the Negro citizens of Bibb County and the City of Macon. (2) The defendants, Guyton G. Abney, J. D. Crump, T. I. Denmark, [fol. 140] and Dr. W. G. Lee, as successor trustees under the will of A. O. Bacon, and intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garton Sparks are also proper parties. (3) The City of Macon having submitted its resignation as the trustee of the property known as Baconsfield, the resignation is accepted by the court. (4) Hugh M. Comer, Lawton Miller, and B. L. Register are appointed as trustees to serve in lieu of the City of Macon. (5) The court retains jurisdiction for the purpose of appointing other trustees that may be necessary in the future. (6) It is unnecessary to pass upon the secondary contention of the intervenors Guyton G. Abney and others.

Reverend E. S. Evans and others in their writ of error to this court assign error on this order of the trial judge. Their contentions will appear from the opinion.

Donald L. Hollowell, William H. Alexander, Jack Greenberg, James M. Nabrit, III, for plaintiff in error.

Jones, Sparks, Benton & Cork, Trammell F. Shi, contra.

[fol. 141] ALMAND, Justice. Counsel for the plaintiffs in error (the Negro intervenors) assert that the decree of the judge of the superior court was "patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment" to the Federal Constitution. The decree did not enforce, or purport to enforce, any judgment, ruling, or decree as related to the intervenors. After determining that all parties were properly before the court, the decree did two things: (1) Accepted the resignation of

the City of Macon as trustee of Baconsfield; and (2) appointed new trustees.

"The law of charities is fully adopted in Georgia . . ." *Jones v. Habersham*, 107 U.S. 174 (5) (2 SC 336, 27 LE 401). Under the law of this State any person may, by will, grant, gift, deed, or other instrument, give or devise property for any charitable purpose. Ga. L. 1937, p. 593 (Code Ann. § 108-207). Any public convenience might be a proper subject for a charitable trust. Code § 108-203. A charity once established is always subject to supervision and direction by a court of equity to render effectual its purpose. Code § 108-204. It is the rule that a charitable trust shall never fail for the want of a trustee. Code § 108-302.

Whether the will of A. O. Bacon, establishing a trust [fol. 142] for the operation of Baconsfield, contemplated by the language, "to the Mayor and Council of the City of Macon and to their successors" (italics ours), that the named trustee might resign, need not be determined. The City of Macon did resign, and the judge of the superior court was confronted with the commandment of Code § 108-302 that a trust shall never fail for the want of a trustee. Being empowered to appoint trustees when a vacancy occurs for any cause, *Thompson v. Hale*, 123 Ga. 305 (51 SE 383), *Harris v. Brown*, 124 Ga. 310 (2) (52 SE 610, 2 LRA (NS) 828), *Woodberry v. Atlas Realty Co.*, 148 Ga. 712 (98 SE 472), *Sparks v. Ridley*, 150 Ga. 210 (3) (103 SE 425), the judge exercised such power and appointed successor trustees.

The contention by counsel for the plaintiffs in error that Code § 69-504 required A. O. Bacon to limit the use of Baconsfield to the members of one race can not be sustained. Code § 69-504, in providing for gifts limited to members of a race, simply states that any person *may* "devise, give, etc." The law of Georgia does not by Code § 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed. Such limitation, however, standing alone, is not invalid, and this court has sustained a testa-[fol. 143] mentary charity naming trustees for establishing and maintaining "a home for indigent colored people 60

years of age or older residing in Augusta, Georgia." *Strother v. Kennedy*, 218 Ga. 180 (127 SE2d 19). A. O. Bacon had the absolute right to give and bequeath property to a limited class.

Counsel for the plaintiffs in error assert that: "As the City was unable to comply with the racially discriminatory direction of the trust, three alternatives were open to the lower court: (1) declare the racially discriminatory provision null and void; (2) remove the trustee (or accept its resignation) and appoint a non-governmental trustee; (3) declare failure of the trust." They insist that the judge should have chosen the first alternative.

Counsel for plaintiffs in error assert that the court should have applied the provisions of Code § 108-202 that when a valid charitable bequest is incapable for some reason of exact execution in the exact manner provided by the testator a court of equity will carry it into effect in such way as nearly as possible to effectuate his intention. The answer to this contention is: the application of the cy-pres rule, as provided in this Code section, was not invoked [fol. 144] by the primary parties to this case, and even if it be conceded (which we do not concede, see *Smith v. Manning*, 155 Ga. 209, 116 SE 813, and *Fountain v. Bryan*, 176 Ga. 31, 166 SE 766) that the intervenors could raise such issue, the facts before the trial judge were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator. There is no testimony in the record of any nature or character, that the board of managers provided by the will, can not operate the park pursuant to the terms and conditions of the will.

Counsel for the plaintiffs in error cite *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230 (77 SC 806, 1 LE2d 792). In the *Pennsylvania* case the United States Supreme Court pointed out that the board which operated Girard College was an agency of the State of Pennsylvania by legislative act, and that the refusal to admit Negroes to Girard College was therefore discrimination by the State. Upon the return of

the case to the Supreme Court of Pennsylvania for further proceedings not inconsistent with the opinion, that court remanded the case to the Orphans' Court for further pro-[fol. 145] ceedings not inconsistent with the opinion of the Supreme Court of the United States. The Supreme Court of Pennsylvania, on the second appearance of the case (see *Girard College Trusteeship*, 391 Pa. 434, 138 A2d 844), stated that the Orphans' Court construed the United States Supreme Court's opinion to mean that the Board of City Trustees was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of the founder, and the Orphans' Court entered a decree removing the Board as trustee of Girard College and substituting therefor thirteen private citizens, none of whom held any public office or otherwise exercised any governmental power under the Commonwealth of Pennsylvania. The Supreme Court of Pennsylvania affirmed this action on review, and again sustained action denying admission to Girard College by the Negro applicants. Counsel for the defendants in error cite *Girard College Trusteeship*, 391 Pa. 434, and strongly rely on this Pennsylvania case. (On review by the United States Supreme Court the motion to dismiss was granted, and treating the record as a petition for certiorari, certiorari was denied. *Pennsylvania v. Board of Directors of City Trusts of Pennsylvania*, 357 U.S. 570 (78 SC 1383, 2 LE2d 1546). A motion for rehear-[fol. 146] ing was denied. (358 U.S. 858.) In so far as the *Girard College Trusteeship* case is applicable on its facts to the present case, it supports the rulings we have made.

The record does not sustain the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. This judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

Judgment affirmed. All the Justices concur.

[fol. 147]
 IN THE SUPREME COURT OF THE STATE OF GEORGIA

E. S. EVANS et al.,

v.

CHARLES E. NEWTON et al.

JUDGMENT—September 28, 1964

This case came before this court upon a writ of error from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[fol. 148]
 IN THE SUPREME COURT OF THE STATE OF GEORGIA

Decided September 28, 1964

Docket No. 22534

REV. E. S. EVANS, LOUIS H. WYNN, REV. J. L. KEY, REV.
 BOOKER W. CHAMBERS, WILLIAM RANDALL, and REV. VAN
 J. MALONE, Plaintiffs-in-Error,

vs.

THE CITY OF MACON; A. O. B. SPARKS, JR., VIRGINIA LAMAR
 SPARKS, M. BARTON SPARKS, Heirs at Law of A. O.
 BACON; GUYTON ADLEY, J. D. CRUMP, J. J. DENMARK,
 DR. W. G. LEE, Successor Trustees under the Will of
 A. O. BACON; CHARLES NEWTON, MRS. T. J. STEWART,
 FRANK M. WILLINGHAM, MRS. FRANCIS K. HALL, GEORGE
 P. RANKIN, JR., MRS. FREDERIC W. WILLIAMS, and MRS.
 KENNETH DUNWOODY, Members of the Board of Man-
 agers under Will of A. O. BACON; HUGH M. COMER,
 LAWTON MILLER, and B. L. REGISTER, Successor Trustees
 in Lieu of The City of Macon, Defendants-in-Error.

No change. Denied. All the Justices concur.

MOTION FOR REHEARING—Filed October 5, 1964

Comes now Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, plaintiffs-in-error, and within the time allowed by law, file this their Motion for Rehearing in the above-stated case, and for grounds thereof, say:

1.

That plaintiffs-in-error believe that this Honorable Court has overlooked the following material fact in the record: Item 9th of the will of A. O. Bacon provides, *inter alia*, that certain property should be left in trust to the "Mayor and Council of the city of Macon, and to their successors". The said item also provides that "The Members of this Board [of Managers] shall first be selected and appointed by the Mayor and Council of the city of Macon, or by their [fol. 149] successors . . . ; and all vacancies on said Board shall be filled by appointments made by the Mayor and Council of the City of Macon . . . , upon nomination made by the Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors." Plaintiffs-in-error aver that the phrase "their successors" as used *supra* in the relevant context makes it quite clear that the successors referred to are the persons occupying the positions of Mayor and councilman of the city of Macon and not persons who have no official position or office with the City of Macon. A reading of the will in its entirety makes it clear to plaintiffs-in-error that it was the testator's intent that the Mayor and Council (or persons succeeding them in those positions) should remain as trustees under the will. Accordingly, the Bibb Superior Court did not effectuate the testator's intent by allowing the City of Macon to resign and was in error in so doing.

2.

That while the language in Georgia Code Annotated Section 69-504 appears to be permissive, the testator was in fact required to limit his beneficence to members of a

particular race. This requirement was the results of the said Code section plus the customs which prevailed at the time the testator's will was drawn. The said Code section cannot be read or properly understood unless done so with a realization that patterns of segregation which were fostered and perpetuated by the State, existed at the time the will was drawn. The plaintiffs-in-error respectfully refer this court to *Robinson v. Florida*, 84 S. Ct. 1693 (1964). In *Robinson*, the State statute did not require restaurants to segregate Negroes and whites. Nevertheless, the Court held that Florida, as did Georgia in the instant case, became involved to such a significant extent that the case must be held to reflect State policy requiring segregation contrary to the Fourteenth Amendment to the United States [fol. 150] Constitution. In reality, the use of precatory words in Section 69-504 does not mean that the testator had a choice in the instant case anymore than the restaurants did in the *Robinson* case.

Wherefore, movants pray that a rehearing be granted in this case and that the judgment of the court below be reversed.

Donald L. Hollowell, William H. Alexander, 859½
Hunter Street, N. W., Atlanta, Georgia 30314;
Jack Greenberg, James M. Nabritt III, 10 Columbus
Circle, New York, New York 10019;

Attorneys for Plaintiffs-in-Error.

[fol. 151]

CERTIFICATE OF PROBABLE CAUSE FOR REHEARING

I, William H. Alexander, of counsel for plaintiffs-in-error in the foregoing case, do certify that, upon careful examination of the opinion of the Court in this case, I verily believe that the facts and the decision mentioned in the attached motion have been overlooked by the Court, which facts and decision are material, and, if considered would require a different judgment from that rendered.

I also certify that a copy of the foregoing motion for rehearing has been served upon opposing counsel of record,

Trammel F. Shi and Jones, Sparks, Benton and Cork, by placing a copy in the United States Mail, postage prepaid, addressed to said counsel at their address of record.

This 5th day of October, 1964.

William H. Alexander

Sworn to and subscribed before me this 5 day of October, 1964.

Mary E. Dobbs, Notary Public, Georgia State at Large.
My Commission Expires June 22, 1968.

[fol. 152] [File endorsement omitted]

[fol. 153]

IN THE SUPREME COURT OF THE STATE OF GEORGIA

22534

E. S. EVANS *et al.*,

v.

CHARLES E. NEWTON *et al.*

ORDER DENYING MOTION FOR REHEARING—October 8, 1964

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 154] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 155]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1964

E. S. EVANS, et al., Petitioners,**vs.****CHARLES E. NEWTON, et al.****ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—December 22, 1964**

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 5, 1965.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 22nd day of December, 1964.

[fol. 156]

SUPREME COURT OF THE UNITED STATES

No. 959—October Term, 1964

E. S. EVANS, et al., Petitioners,

v.

CHARLES E. NEWTON, et al.

ORDER ALLOWING CERTIORARI—April 26, 1965

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



[131]

IN THE SUPREME COURT OF GEORGIA

22534

Decided March 14, 1968

EVANS et al. v. NEWTON et al.

OPINION OF SUPREME COURT OF GEORGIA

—Filed March 31, 1966

The judgment of this Court of September 28, 1964, in the case of Evans et al. v. Newton et al., having been reversed by the Supreme Court of the United States on January 17, 1966, the judgment of this Court is vacated and the trial court directed to pass on the contentions of the parties not passed on previously, and the judgment of the United States Supreme Court of January 17, 1966, is made the judgment of this Court.

[132] ALMAND, Justice. The judgment of this Court of September 28, 1964 (Evans et al. v. Newton et al., 220 Ga. 280 (138 SE2d 573)), affirming the judgment of the Bibb Superior Court, was on January 17, 1966, reversed by the Supreme Court of the United States, — US —. In its mandate to this Court, it was ordered "that the cause be remanded to the Supreme Court of the State of Georgia for further proceedings not inconsistent with the opinion of this Court".

In response to our request, counsel for the plaintiff-in-error and counsel for the defendant-in-error, other than the City of Macon, have filed briefs as to what directions, if any, should be given on the return of this case to the trial court.

When this case was before us for review, we sustained the orders of the trial judge accepting the resignation of

the City of Macon as trustee of Baconsfield and appointing new trustees. The Supreme Court of the United States, in the general reversal of the judgment of this Court, did not, in the majority opinion, make any specific ruling on the right of the City of Macon to resign as trustee or that new trustees [133] could not be appointed. The resignation of the City of Macon as trustee of Baconsfield because of its inability to carry out the provisions of the trust being an accomplished fact (and we know of no law that could compel it to act as trustee) and the order of the court appointing new trustees having been reversed, the trust property is without a trustee. Even if new trustees were appointed, they would be compelled to operate and maintain the park as to Whites and Negroes on a non-discriminatory basis which would be contrary to and in violation of the specific purpose of the trust property as provided in the Will of Senator Bacon.

Under these circumstances, we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated. (See Restatement (Second), Trusts § 335; "Where a trust is expressly created . . . [and] fail[s] from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." Ga. Code § 108-106(4).)

The trial court in its order stated that it was not at that time necessary to pass upon the secondary contentions of the trustees of Senator Bacon's estate and the intervening [134] heirs as to the failure of the purpose of the trust and its reversion to the Bacon Estate. As we view the status of the case, in light of the United States Supreme Court's decision, direction is given that the court on the return of the case determine and pass upon the contentions of the trustees of the Bacon Estate and intervening heirs and such other questions as may be properly raised by the parties.

The judgment of this Court of September 28, 1964, is vacated, and the judgment of the Supreme Court of the United States is made the judgment of this Court.

Judgment reversed with direction. All the Justices concur.

(Certificate of Service Omitted in Printing.)

[136]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

MOTION FOR SUMMARY JUDGMENT

—Filed November 10, 1966

Come now GUYTON G. ABNEY, J. D. CRUMP, T. I. DENMARK and Dr. W. G. LEE as Successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, hereinafter referred to at times as Senator Bacon, defendants in the above case, and represent to and move the court as follows:

1.

The final order and decree of this court of March 10, 1964, was appealed to and affirmed by the Supreme Court of Georgia on September 28, 1964, and on writ of certiorari the United States Supreme Court reversed the judgment of the Supreme Court of Georgia on January 17, 1966. Thereafter on March 14, 1966, the judgment of the United States Supreme Court was made the judgment of the Supreme Court of Georgia, reversing and vacating the prior judgment of this court. The Georgia Supreme Court remanded the case to this court for further proceedings consistent with the decision of the United States Supreme Court and specifically directed this court to pass on contentions of the parties not passed on previously. The foregoing judgment of the Supreme Court of Georgia is now the final unappealed from judgment of that court.

2.

On January 17, 1966, Bacon's trust became unenforceable and Baconsfield and the funds held for its support reverted [137] at that time into Bacon's estate by operation of law.

On March 14, 1966, the Georgia Supreme Court recognized that this had occurred saying "We are of the opinion that the sole purpose for which this trust was created has been terminated." This judgment declaring what had transpired in regard to the title is now the law of the case. It remains only for this Court at this time to give effect to said reversion of title.

3.

The estate of Senator Bacon has long since been completely administered, and his executors have been dismissed and discharged, and movants represent to the court that the persons to whom said Charitable Trust fund reverts are to be determined under the residuary provisions of Item 6th of the Will of Senator Bacon, as ~~revised~~ by the codicil to said Will, as property reverting to ~~reinstate~~ on and as of January 17, 1966, the date of the failure and termination of said Charitable Trust, and that as of said date the legal title to the Charitable Trust fund reverted to movants as Successor Trustees under said Item 6th of said Will.

4.

Under Item 6th of said Will and the codicil thereto the residuum of the testator's estate was bequeathed and devised in trust to the trustees therein named, movants being the Successor Trustees under said Item 6th, and upon the death of Mrs. Virginia Lamar Bacon, the surviving widow of the testator, said trust property as it then existed was divided into two equal parts. The trust under said Item 6th will hereinafter be referred to as the Item 6th Trust.

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5.

As to one of said equal parts said Item 6th Trust is still executory for the benefit for life of Shirley Holcomb

Curry, Marie Louise Lamar Curry and Manley Lamar Bacon Curry, surviving children of Augusta Lamar Bacon Curry, deceased, and upon their deaths as provided therein, and the legal title to said one-half undivided interest in the Charitable Trust fund is in Movants as Successor Trustees as aforesaid. Said one-half equal part of the Charitable Trust fund is herein identified as the Curry share.

6.

The remaining equal share of the Charitable Trust fund is herein identified as the Sparks share. Said one-half equal share of the Item 6th Trust, the Sparks share, became fully executed upon the death of said Mary Louise Bacon Sparks predeceased by Willis B. Sparks, Sr., her husband, and said Sparks share thereupon vested in equal shares in fee simple and was conveyed in equal shares to A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks, surviving children of said Mary Louise Bacon Sparks, and as to the Sparks share of the Charitable Trust said Item 6th Trust was automatically executed upon its coming into existence by reversion to the estate of Senator Bacon, so that movants have no trust duties to perform with respect thereto.

7.

At the time of the filing of the petition in this case all of the aforesaid children of Mary Louise Bacon Sparks were in life and were *sui juris*, and they intervened in the case on January 8, 1964, in support of the will of Senator Bacon, but also to assert their interest by reversion in the Charitable Trust fund if the Will of Senator Bacon could not be carried [139] out. A. O. B. Sparks, one of said intervenors, subsequently departed this life on April 19, 1964, prior to the reversion of said Charitable Trust

fund, leaving a Will which is of record in the Court of Ordinary of Bibb County, Georgia. The Citizens and Southern National Bank and Willis B. Sparks, Jr., as Executors of the Will of A. O. B. Sparks, deceased, have been substituted as Intervenors in his place for the purpose of asserting such interest in the Charitable Trust fund as would have reverted to said A. O. B. Sparks rather than to his estate if he had remained in life.

8.

Movants allege that the legal and beneficial title to said Sparks share of said Charitable Trust has reverted to and has vested in equal undivided shares in said Willis B. Sparks, Jr., Virginia Lamar Sparks, M. Garten Sparks and in the estate of said A. O. B. Sparks, deceased.

9.

The City of Macon having resigned as original Trustee of the aforesaid Charitable Trust, and said original Trustee having no trust funds or properties in its hands or in its name, and having no trust duties to perform, said City of Macon is no longer a necessary party to this proceeding and should be dismissed as such without cost to it.

10.

The order of this court, appointing Hugh M. Comer, Lawton Miller and B. L. Register as Successor Trustees having been reversed, leaving the Charitable Trust without a trustee, [140] and said Successor Trustees having no trust duties to perform except to account for the legal title to the trust properties and assets and to account for any trust funds remaining in their hands, said Successor Trustees should be allowed to account for any funds in their hands, and for their acts and doings as de facto Suc-

cessor Trustees, and should be acquitted of their trust upon such accounting.

11.

The individuals heretofore appointed as the Board of Managers who are the plaintiffs herein have been acting since their appointment and are still acting under color of their office and have trust funds and assets in their hands and should be allowed to file an accounting of their acts and of the funds in their hands and should then be released and acquitted from further liability.

12.

To the extent if any that the de facto Successor Trustees or the de facto Board of Managers have incurred obligations in the conduct of this litigation or in connection with the management and operation of the properties and assets of said Charitable Trust fund an appropriate order should be entered providing for the payment thereof or, alternatively, charging the trust properties and assets with the payment thereof in the hands of the persons to whom said trust assets are distributed.

13.

One or more suitable persons, who may include all or any of the de facto Successor Trustees or de facto Board of Managers, should be appointed by this court as Receiver or Receivers to take possession and custody of the properties, assets and funds of the Charitable Trust and to protect and manage the same under the further orders and directions of this court and to transfer [141] the title thereto and possession thereof to the persons entitled to receive the same.

14.

Rev. E. S. Evans and others having intervened herein for the purpose of asserting certain rights as alleged beneficiaries of the aforesaid Charitable Trust, in their own behalves and as representatives of a designated class, and said Charitable Trust having failed of its purpose and having terminated, all relief prayed for by them should be denied.

WHEREFORE, Movants pray:

- (a) That all parties to this case other than themselves be ordered to show cause at a time and place to be fixed by the court why Movants' prayers should not be granted.
- (b) That summary judgment on the pleadings and mandate of the Supreme Court of Georgia be granted to Movants as herein prayed;
- (c) That the Successor Trustees herein named and the Board of Managers herein referred to be allowed and directed to file an accounting of their respective acts and doings, and of the trust properties, assets and funds in their hands, and that they be hence discharged without cost to them;
- (d) That the court give appropriate direction under a proper interpretation of the Last Will and Testament of Senator Bacon respecting the persons to whom the properties, assets and funds of the Charitable Trust have reverted, directing the Receiver or Receivers to be appointed by this court to effectuate such reversion in such manner as may be necessary and appropriate.

/s/ JONES, SPARKS, BENTON & CORK
Attorneys for Movants

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O R D E R

The foregoing Motion for Summary Judgment read, considered and ordered filed.

All parties other than movants are ordered to show cause at 10 o'clock A.M., on the 19 day of December, 1966, why movants' prayers for summary judgment and other relief should not be granted as prayed.

This 10 day of November, 1966.

/s/ O. L. LONG
J.S.C.M.C.

FILED IN OFFICE

10th day of November, 1966

/s/ LILLIAN LAVINE
Deputy Clerk

[143]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

AMENDMENT SUBSTITUTING PARTIES

—Filed November 10, 1966

Come now Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks, intervenors in the above stated case, and The Citizens and Southern National Bank and Willis B. Sparks, Jr., as Executors of the Last Will and Testament of A. O. B. Sparks, deceased, and respectfully show to the court:

1.

A. O. B. Sparks, one of the original intervenors in the above case, departed this life on April 19, 1964, leaving a Will which is of record in solemn form in the Court of Ordinary of Bibb County.

2.

An order of this court is desired substituting for the said A. O. B. Sparks, deceased, as one of the original intervenors, the aforesaid Executors of his Will.

/s/ JONES, SPARKS, BENTON & CORK
Attorneys

[144] The foregoing amendment read, allowed and ordered filed.

It IS ORDERED that The Citizens and Southern National Bank and Willis B. Sparks, Jr., as Executors of the Last Will and Testament of A. O. B. Sparks, deceased, be substituted for said A. O. B. Sparks, one of the intervenors in said case.

This 10 day of November, 1966.

/s/ O. L. LONG
J.S.C.M.C.

FILED IN OFFICE

10th day of November, 1966

/s/ **LILLIAN LAVINE**
Deputy Clerk

[145]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

INTERROGATORIES

—Filed December 27, 1966

To: City of Macon and Trammell Shi, City Attorney

Comes now Rev. C. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall and Rev. Van J. Malone, intervenors in the above action, and for purposes of discovery requires the defendant City of Macon to answer the following interrogatories within fifteen (15) days from the date of service, as provided by law, and that a copy of the answers be furnished the intervenors' attorney, William H. Alexander.

—1—

State the names, addresses and term of office of each and every persons serving full or part-time as City Councilmen for the City of Macon, Georgia.

—2—

State whether any of the above-named councilmen claim any interest, future, present, vested, contingent or otherwise in Baconsfield Park.

—3—

With reference to Interrogatory No. 2 set forth the name of such councilman and his specific claim.

—4—

State whether during the period 1955 through 1966 inclusive there was adopted by the Macon City Council any

rule, resolution, [146] ordinance, or mandate with reference to Baconsfield Park.

—5—

With reference to Interrogatory No. 4, set forth in full any such rule, resolution, ordinance or mandate giving the date of adoption and the effective date of said rule, resolution, ordinance or mandate.

—6—

State whether during the period 1955 through 1966 inclusive, any heirs at law of Senator Bacon, or any person or persons claiming an interest in Baconsfield Park, have conveyed by deed or otherwise their interest in whole or in part to the City of Macon.

—7—

If the answer to No. 6 is "Yes", state what interest was conveyed, the names and addresses of such grantors, the date of same and the date the instrument was recorded.

—8—

State whether Baconsfield Park has at anytime housed or had on its premises a zoo, museum, menagerie, public exhibit or a building of any kind, and whether such is presently on the premises of Baconsfield Park.

—9—

With reference to No. 8, state specifically what was housed or placed on the premises of Baconsfield Park and by whom owned and maintained.

—10—

State whether the City Council of Macon, Georgia has at anytime by administrative or legislative act, resolutions or otherwise claimed Baconsfield Park for and on behalf of the City of Macon.

—11—

State whether any Federal, State or City funds have been expended for the maintenance or operation of Baconsfield Park [147] since 1950.

—12—

If the answer to Interrogatory No. 11 is "Yes", set forth the amount of Federal, State or City funds expended, indicating the years expended and what specific purpose the money was expended.

—13—

State whether the income from the trust fund left by Senator Bacon to operate and maintain Baconsfield Park has been depleted.

—14—

If the trust fund inquired of in No. 13 is not depleted, state the amount which is presently extant and the depository which holds the same.

—15—

State the annual operating and maintenance cost of Baconsfield Park for each year from January 1, to December 1, 1966 inclusive.

—16—

With reference to No. 15, state the amounts and specific purposes for which all monies were expended to maintain and operate Baconsfield Park beginning with the year 1955 ending with the present year or any part thereof.

—17—

State whether any individuals or organizations have contributed monies, items, animals, or other tangibles to the City of Macon for the maintenance, operation, beautification or for additions to Baconsfield Park.

—18—

State whether the City of Macon has at anytime sold, leased, disposed of, or alienated, any part of Baconsfield Park.

—19—

If the answer to No. 18 is "Yes", state the date, means, purpose, reason and specifically what part was sold, leased, disposed [148] of or alienated and the specific allocation or fund in which such compensations were placed.

—20—

State whether Baconsfield Park is abutted on either boundary by any federal, state, county or city highway, road, stream or project.

—21—

State whether the City of Macon has or has caused to have Baconsfield Park appraised or valued for any purpose since 1955.

—22—

If the answer to No. 21 is "Yes", state the date such appraisals were made, by whom made and the appraised value.

—23—

State the names and number of individuals, who service, maintain and operate Baconsfield Park, stating their particular function, weekdays worked, by whom employed and paid, and weekly pay.

—24—

State the nature, type and size of the operative grant given by Senator Bacon to the City of Macon, Georgia setting forth in proper copy the deed in which same was done and recorded.

—25—

State whether Negroes are now excluded from Baconsfield Park.

—26—

If the answer to No. 25 is "Yes", state whether such exclusion is sanctioned by any legislative or administrative act of the City Council of Macon, Georgia or any court order.

—27—

State the number of persons making use of Baconsfield Park annually from the year 1950 to the present.

—28—

If Negroes are not admitted to Baconsfield Park presently state the last date on which Negroes were admitted to use same.

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—29—

If Baconsfield Park is no longer open state the last date on which same was open and give reasons for the closing.

This 24 day of December, 1966.

/s/ WILLIAM H. ALEXANDER
WILLIAM H. ALEXANDER
859½ Hunter Street, N. W.
Atlanta, Georgia 30314
525-8372
Attorney for Intervenors

FILED IN OFFICE
27th day of December, 1966

/s/ LILLIAN LAVINE
Deputy Clerk

[151]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

ANSWERS TO INTERROGATORIES

—Filed January 6, 1967

Comes now, the City of Macon, acting by and through the Honorable B. F. Merritt, Jr., Mayor, and files these its answers to the interrogatories served upon the City of Macon by counsel for the intervenors and answers the numbered interrogatories as follows:

1.

The names and addresses of the City Councilmen for the City of Macon, Georgia are as listed below. All are currently serving four (4) year terms which expire in November of 1967.

Rex Elder
779 Nottingham Drive
Macon, Georgia

Robert M. Wade
2320 Beech Avenue
Macon, Georgia

Dan Tidwell
911 Laurel Avenue
Macon, Georgia

Jack O. Grant
2950 Hillandale Circle
Macon, Georgia

Tom H. Ivey
1979 Second Street
Macon, Georgia

Sydney J. Pyles
2504 Kensington Rd.
Macon, Georgia

T. Fred Davenport
234 Corbin Avenue
Macon, Georgia

Winton E. Bloodworth
712 Anderson Street
Macon, Georgia

William K. Stanley, Jr.
127 Rogers Avenue
Macon, Georgia

T. Frank Jones
759 Harrold Street
Macon, Georgia

Harold E. Causey
2082 Vineville Avenue
Macon, Georgia

Ronnie Thompson
3925 Easy Street
Macon, Georgia

M. T. Watkins
2608 Napier Avenue
Macon, Georgia

Mrs. Agnes Hatcher
465 Pine Crest Road
Macon, Georgia

2.

No

3.

NOT APPLICABLE

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4.

The only such rule, resolution, ordinance or mandate adopted was the resolution of February 4, 1964, a copy of which is attached as an exhibit to the amendment to the answer of the City of Macon filed February 5, 1964, and which is a part of the record in this case.

5.

As stated in answer to Interrogatory No. 4, the only such resolution is already a part of the record in this case. It became effective upon adoption.

6.

No

7.

NOT APPLICABLE

8.

At one time, caged animals belonging to the City of Macon were on the premises, but it could not really be called a zoo. All of such animals were removed in June of 1964. There was a tool shed and a playground shed located on the premises. As far as is known, they are still there, but are not being used by the City of Macon. A large frame building remains on the premises.

9.

The cages housing the animals were owned and maintained by the City until their removal. The tool shed and the shed housing playground equipment were used by City employees, but it is not known by whom they were owned. They are not believed to be in use at the present time. The large frame building was on the premises when the property was conveyed to the City of Macon as trustee and has been used for various purposes. Recently, it has been used as a womans club house and for social events under arrangement with the Board of Managers, the details of which are [153] unknown to the City of Macon.

10.

No

11.

Yes

12.

City funds have been expended in that regular maintenance forces were permitted to perform maintenance functions. The monetary expenditure on such maintenance is unknown and cannot be determined. The work was done

under the supervision of a person employed and paid by the Board of Managers. No City funds have been expended directly or indirectly since June of 1964.

13.

The only trust fund with which the City of Macon has had any connection has long since depleted.

14.

NOT APPLICABLE

15.

The City has no information on which to base an answer to this question. This is a matter solely within the knowledge of the Board of Managers. No separate records were kept in connection with maintenance work done by City employees. One employee of the Recreation Department of the City of Macon worked on the playground which was situated in the park and received a salary from the City in the amount of approximately \$1181.70 per year.

16.

The answer to Interrogatory No. 15 will apply equally to Interrogatory No. 16.

17.

To the best of our knowledge, No.

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18.

No. The fact that the City of Macon resigned as trustee is a matter of record in the case.

19.

NOT APPLICABLE

20.

YES

21.

NO

22.

NOT APPLICABLE

23.

The City of Macon has no knowledge of the operation of the park since June of 1964.

24.

The only grant from Senator Bacon was contained in his will which is attached as Exhibit "A" to the petition in this case, and the City of Macon has no other knowledge in this connection.

25.

As far as is known, they are not.

26.

NOT APPLICABLE

27.

The City has no knowledge on which to base an answer and no means of acquiring such knowledge and is, therefore, unable to answer Interrogatory No. 27.

28.

NOT APPLICABLE, as far as the City knows.

The City has no knowledge except to say that the park is an open area which has, as far as is known, been in no way closed [155] off to public use.

This 6th day of January, 1967.

/s/ **B. F. MERRITT, JR.**

B. F. MERRITT, JR., Mayor
City of Macon, Georgia

GEORGIA, BIBB COUNTY

Personally appeared before F. R. Raley, an officer duly authorized to administer oaths, one B. F. MERRITT, JR., who, after being duly sworn, deposes and says under oath, that all statements contained in the foregoing answers to interrogatories are true and correct to the best of his information and belief.

Sworn to and subscribed before
me, this 6th day of Jan., 1967.

/s/ **F. R. RALEY**
Notary Public,
(N. P. Seal)
(Bibb Co. Ga.)

/s/ **B. F. MERRITT, JR.**
B. F. MERRITT, JR.

(Certificate of Service Omitted in Printing.)

[157]

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

[Title Omitted]

RESPONSE TO MOTION FOR SUMMARY JUDGMENT FILED BY
SUCCESSOR TRUSTEES UNDER WILL OF AUGUSTUS
OCTAVIUS BACON
—Filed January 13, 1967

Comes now, REV. E. S. EVANS, LOUIS H. WYNNE, REV. J. L. KEY, REV. BOOKER W. CHAMBERS, WILLIAM RANDALL, and REV. VAN J. MALONE, Intervenors, who file this response to the motion for summary judgment filed by the successor trustees, and show the Court the following:

—1—

The final order and decree of this Court of March 10, 1964, was appealed to and affirmed by the Supreme Court of Georgia on September 28, 1964, and on writ of certiorari the United States Supreme Court reversed the judgment of the Supreme Court of Georgia on January 17, 1966. Thereafter on March 14, 1966, the judgment of the United States Supreme Court was made the judgment of the Supreme Court of Georgia, reversing and vacating the prior judgment of this Court. The Georgia Supreme Court remanded the case to this Court for further proceedings consistent with the decision of the United States Supreme Court and specifically directed this Court to pass on contentions of the parties not passed on previously.

—2—

That this Court is bound by the said judgment of the United [158] States Supreme Court in the ruling in *Evans, et al. v. Newton, et al.*, 86 S. Ct. 486, 15 L. ed. 2nd 373.

—3—

That the said judgment of the Georgia Supreme Court on remand is not a final judgment as a matter of State or federal law inasmuch as there remains to be done by this Court action affecting the interest of all parties concerned.

—4—

That the Baconsfield trust has neither been completely administered nor is it unenforceable as a matter of law and the trust is further obliged to be enforced by the City of Macon, Georgia under the doctrine of Cy Pres.

—5—

That under no circumstances presented by the record of this case, or the subsequent motion of the successor trustees seeking a summary judgment, is a failure of the Baconsfield trust required as a matter of law.

—6—

That the State of Georgia has created, and the City of Macon has controlled, participated, and involved itself in Baconsfield Park to such a substantial degree, and over such a long period of time that there has in effect been created an irrevocable trust and dedication of Baconsfield Park to the City of Macon for the use of its citizens.

—7—

That the grant of Baconsfield Park from Senator Bacon and a subsequent acceptance by the City of Macon should be construed as a dedication of lands to public use, of which there can be no appropriation by the heirs or others to be used for private purposes.

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—8—

That to effect a reversion of Baconsfield Park to the estate of Senator Bacon and to order a distribution of same to the heirs at law for the sole purpose of preventing Negroes the right to use said park, will amount to State action in the aid of Senator Bacon's clear discriminatory intent which is a clear violation of the Fourteenth Amendment rights of the Negro intervenors and members of their class as espoused by the Supreme Court of the United States in the case of *Shelley v. Kramer*, 334 U. S. 1.

—9—

That the City of Macon, Georgia, in its corporate capacity, owns and holds Baconsfield Park by grant from Senator Bacon in fee simple absolute and may not abandon, or disclaim same for the sole purpose of denying Negroes the use of said park.

WHEREFORE, intervenors pray that this Court:

- a) deny defendant movants the requested motion for a summary judgment;
- b) vacate its previous judgment permitting the City Council of Macon, Georgia to resign as trustee of Baconsfield;
- c) vacate its previous judgment appointing private trustees to administer the Bacon trust;
- d) make so much of the Georgia Supreme Court's judgment on remand as is consonant with and not inconsistent with the judgment of the United States Supreme Court in the case of *Evans, et al. vs. Newton, et al.*, 86, S. Ct. 486, 15 L. ed. 2d 373, the judgment of this Court; and

- e) declare the City Council of Macon, Georgia and its successors in interest the trustee of the [160] Baconsfield Park forever to hold, maintain and operate as a public park on a nondiscriminatory basis and otherwise in accordance with the wishes of Senator Bacon as expressed in his last will and testament; or
- f) alternately, declare the City Council of Macon, Georgia and its successors in interest, the bona fide holders of Baconsfield Park in fee simple;
- g) grant them cost and attorneys fees in this action;
- h) grant such other and further relief as to this Court may seem just and proper.

This 12 day of January, 1967.

/s/ WILLIAM H. ALEXANDER
WILLIAM H. ALEXANDER
859½ Hunter St., N.W.
Atlanta, Georgia 30314

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

Attorneys for Intervenors

(Certificate of Service Omitted in Printing.)

[161]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

RESPONSE TO MOTION FOR SUMMARY JUDGMENT FILED BY
SUCCESSOR TRUSTEES UNDER WILL OF AUGUSTUS
OCTAVIUS BACON—Filed January 16, 1967

Now come Hugh M. Comer, Lawton Miller, and B. L. Register, as successor trustees in lieu of the City of Macon and all of the members of the Board of Managers of Baconsfield, both the individuals in whose behalf the original complaint was filed and their successors the presently acting members of said Board of Managers of Baconsfield, in response to the Motion for Summary Judgment which has been filed by Guyton G. Abney, et al, as successor trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, and show:

1.

These respondents in their respective capacities as Trustees and as members of the Board of Managers of Baconsfield, have endeavored to the best of their abilities to discharge their duties in such capacities in accordance with the provisions of the trust which was created by the will of Augustus Octavius Bacon, deceased.

2.

The Supreme Court of Georgia having ruled that it is of the opinion that the sole purpose for which this [162] trust was created has been terminated, as alleged in Paragraph 2 of the motion, these respondents stand ready to account for all funds and property constituting the assets of said trust

in their hands, and to abide the further orders of this Court.

WHEREFORE, respondents pray that a decree be entered determining whether said trust has terminated and directing these respondents as to the persons to whom they should account for the assets of the trust which are in their hands in the event it is determined that said trust has been terminated.

/s/ MARTIN, SNOW, GRANT & NAPIER
MARTIN, SNOW, GRANT & NAPIER
700 Home Federal Building
Macon, Georgia

*Attorneys for Hugh M. Comer,
Lawton Miller, and B. L. Register,
Successor Trustees in lieu of the
City of Macon, and attorneys for
the members of Baconsfield Board
of Managers as formerly or now
constituted.*

(Certificate of Service Omitted in Printing.)

[164]

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

[Title Omitted]

RESPONSE TO MOTION FOR SUMMARY JUDGMENT FILED BY
SUCCESSOR TRUSTEES UNDER WILL OF AUGUSTUS
OCTAVIUS BACON—Filed January 16, 1967

Come now WILLIS B. SPARKS, JR., VIRGINIA LAMAR SPARKS and M. GARTEN SPARKS, and THE CITIZENS AND SOUTHERN NATIONAL BANK AND WILLIS B. SPARKS, JR., AS EXECUTORS OF THE WILL OF A. O. B. SPARKS, Deceased, intervenors in the above captioned case, and file this response to the motion for summary judgment filed by the Successor Trustees as follows:

1.

Respondents admit the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of said motion for summary judgment.

2.

Answering paragraph 13 of said motion respondents admit that one or more suitable persons should be appointed by this court for the purposes set forth in said paragraph.

3.

Respondents admit paragraph 14 of said motion.

WHEREFORE, having fully answered, respondents join with said Successor Trustees under the Will of Augustus Octavius Bacon in praying for the judgment and other relief sought by them.

/s/ JONES, SPARKS, BENTON & CORK
Jones, Sparks, Benton & Cork
1007 Persons Building
Macon, Georgia 31201

Attorneys for Respondents

(Certificate of Service Omitted in Printing.)

[166]

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

[Title Omitted]

INTERROGATORIES—Filed February 1, 1967

To:

BOARD OF MANAGERS OF BACONSFIELD PARK

AND

MARTIN, SNOW, GRANT & NAPIER, their Attorneys of record.

Comes now, REV. C. S. EVANS, et al., intervenors, and for purposes of discovery, requires the Board of Managers to answer the following interrogatories within fifteen (15) days from the date of service, as provided by law, and that a copy of the answers be furnished intervenors' attorney, William H. Alexander.

—1—

State whether Baconsfield Park at anytime housed or had on the premises a zoo, museum, menagerie, public exhibit or a building of any kind, and whether such is presently on the premises of the park.

—2—

With reference to No. 1, state specifically what was housed or placed on the premises of the park and by whom owned and maintained.

[167]

—3—

State whether any Federal, State or City funds have been expended for the maintenance, operation or capital improvement of the park since 1950.

—4—

If the answer to No. 3 is "yes," set forth separately the amount of such Federal, State or City funds expended, indicating the year expended and what specific purpose the money was expended.

—5—

State whether the income from the trust fund left or established by Senator Bacon to operate and maintain the park has been depleted.

—6—

If the answer to No. 5 is "yes," state the year in which depleted and the sources of operating revenue for the park since the year of depletion.

—7—

If the answer to No. 5 is "no," state the amount which is presently extant and the depository for same.

—8—

State the annual operating and maintenance cost of Baconsfield Park for the calendar years 1965 and 1966.

—9—

With reference to No. 8, state the amounts and specific purposes for which all monies were expended to maintain and operate the park during the period 1960 and 1966, inclusive.

—10—

If capital expenditures have been made on the park during [168] the period 1955 to 1966, inclusive, state the

amount of such expenditures for each year and the purpose for which spent.

—11—

State whether any individuals or organizations have contributed monies, items, animals, or other tangibles to Baconsfield Park, for the maintenance, operation, beautification, improvement, enjoyment, or for additions to Baconsfield Park. If the answer is "yes," specify in detail what was contributed and by whom.

—12—

State the names and titles or positions, and the addresses of the persons who have had the administrative responsibility for operating Baconsfield Park during the period 1960 to 1966, inclusive.

—13—

State the names and number of individuals, who during the years 1963 and 1966, serviced, maintained and operated Baconsfield Park, stating their particular function, weekdays worked, by whom employed and paid, and their weekly or monthly pay.

—14—

State whether there are any buildings located on Baconsfield Park which were built with federal funds, or which were built with the help of any federally aided program.

—15—

If the answer to No. 14 is "yes," describe the building, state the year it was completed, and the amount of federal

funds expended, and the federally aided program that was involved.

—16—

If any building on Baconsfield Park has been used by any [169] club, group or organization for a regular meeting place during the period 1955 to 1966, inclusive, give the following information:

- (a) Name and address of the club, group, or organization;
- (b) The years in which it has held meetings;
- (c) The purpose or function of the club, group, or organization;
- (d) The approximate number of members of the club, group, or organization;
- (e) State whether the said members are white or Negro, to the best of your knowledge;
- (f) State whether the club, group or organization during the years 1960 to 1966 paid any money to the Board of Managers or the City of Macon for the use of said building on Baconsfield Park. If the answer is "yes," state the amount of money and to whom paid.
- (g) State how the building being used for the club, group, or organization is maintained (e. g., who keeps it clean, repairs it, etc.).

—17—

If any building on Baconsfield Park has not been used as a regular meeting place for any club, group, or organization, but has, from time to time, been used as a meeting place, or for educational or recreational purposes, by dif-

ferent clubs, groups, or organizations, then give in reference thereto the information requested in subparagraphs (a) through (g) above.

—18—

State, to the best of your knowledge, the number of persons who used Baconsfield Park during each of the following years: 1964, 1965, and 1966.

[170]

—19—

State what recreational facilities and equipment are located at the park.

—20—

To the best of your knowledge, has there ever been any fees charged for the use of Baconsfield Park or for admission thereto?

—21—

If the answer to No. 20 is "yes," state who imposed the charges or admission fee, the purpose for charging same, the amount collected during each of the last five years, and how the same was expended.

—22—

In reference to No. 5 above, state whether there is now in existence a trust fund or any other type of fund used exclusively for the care, operation, maintenance, and capital improvement of Baconsfield Park. If the answer is "yes," state the amount that was in existence on each of the following dates and the name of the bank or depository of same:

- (a) January 1, 1955;
- (b) January 1, 1964;
- (c) January 1, 1965;
- (d) January 1, 1966;
- (e) January 1, 1967.

This 30 day of January, 1967.

/s/ WILLIAM H. ALEXANDER
WILLIAM H. ALEXANDER
859½ Hunter St., N. W.
Atlanta, Georgia 30314

JACK GREENBERG
JAMES M. NABRIT, III
Suite 2030
10 Columbus Circle
New York, New York 10017

Attorneys for Intervenors

(Certificate of Service Omitted in Printing.)

[172]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

ANSWER OF BOARD OF MANAGERS OF BACONSFIELD PARK TO
INTERROGATORIES OF REVEREND C. S. EVANS, ET AL.,
INTERVENORS—Filed February 14, 1967

The interrogatories served upon counsel for the Board of Managers of Baconsfield brought by attorneys for Reverend C. S. Evans, Et. al., Intervenors, are answered as follows:

1.

Baconsfield Park at one time housed a few animals in cages but never in sufficient number or variety to be properly classed as a zoo. None of such animals or cages are located on the premises at this time and have not been located there since June, 1964. The Park does have on its premises a building which is known as the Woman's Clubhouse.

2.

A few animals consisting of monkeys, a bear, ducks, rabbits, a raccoon, a few deer, a few peafowl and pheasants were at one time kept in cages in one area of the Park, and so far as is known to this Board, said animals were owned and maintained by the Trustee named in Senator Bacon's will. All of said animals and cages were removed from the Park [173] by June, 1964, and have not been maintained there since that date. The building known as the Woman's Clubhouse is a part of the real estate upon which the Park is located, and consequently is owned by the owner of the legal title to the land on which it is located.

It is maintained by the Macon Woman's Club, a private organization, which is in exclusive charge of the use of that building.

3.

Some City funds have been expended for the maintenance and operation of the Park from 1950 up until the City resigned as Trustee in 1964, and since that date no City funds and no Federal or State funds have been expended for maintenance, operation or capital improvement of the Park.

4.

The amounts of such funds expended by the City are unknown to the Board of Managers of Baconsfield.

5.

As to the trust fund consisting of bonds bequeathed to the Mayor and Council of the City of Macon by the tenth item of Senator Bacon's will, the members of the Board of Managers of Baconsfield have no knowledge as to whether the income or principal thereof has been depleted, but as to the property which the ninth item of said will directed that the Board of Managers might use for the purposes of income, said property is presently being used by the Board for the purpose of income and is producing income.

[174]

6.

Not applicable.

7.

The Board of Managers of Baconsfield now has on hand the sum of \$9,746.21, received as income, and the same is deposited in the First National Bank & Trust Company in Macon.

8.

The annual operating and maintenance costs of Baconsfield Park for the calendar year 1965 was \$7,073.80 and for the year 1966 was \$6,675.89.

9

Monies which were expended by the Board of Managers of Baconsfield for maintaining and operating the Park during the years stated in this interrogatory were as follows:

1960—Flowers and fertilizers \$665.78, Insurance \$26.28, Agent's Commissions \$255.00, Maintenance \$350.00, Equipment \$-0-, Labor \$-0-, Misc. \$10.14.

1961—Flowers and fertilizers \$817.72, Insurance \$31.00, Agent's Commission \$255.00, Maintenance \$-0-, Equipment \$-0-, Labor \$542.00, Misc. \$-0-.

1962—Flowers and fertilizers \$904.67, Insurance \$27.90, Agent's Commission \$272.92, Maintenance \$13.60, Equipment \$253.98, Labor \$522.50, Misc. \$-0-.

1963—Flowers and fertilizers \$658.30, Insurance \$27.90, Agent's Commissions \$279.00, Maintenance \$-0-, Equipment \$-0-, Labor \$500.00, Misc. \$-0-.

1964—Flowers and fertilizers \$320.00, Insurance \$248.89, Agent's Commissions \$261.25, Maintenance \$4,697.52, Equipment \$500.00, Labor \$500.00, Misc. \$18.12.

1965—Flowers and fertilizers \$44.80, Insurance \$314.00, Agent's Commissions \$569.82, Maintenance \$4,868.40, Equipment \$-0-, Labor \$1,256.28, Misc. \$20.50.

1966—Flowers and fertilizers \$-0-, Insurance \$289.00, Agent's Commissions \$360.79, Maintenance \$3,257.33, Equipment \$-0-, Labor \$2,768.77, Misc. \$-0-.

10.

Capital expenditures made by the Board of Managers during the period 1955 to 1966 were as follows:

1956—Paving Brick Walk	\$3,392.10
Fill work in play area	3,500.00
Gate entrance	4,815.80
1957—Fill work	5,400.00
1958—Asphalt work	1,300.00
1959—Sprinkler system and labor	1,100.00
[175]	
1959—Storm sewer, driveway curb and gutter from Nottingham Drive to parking area	\$4,009.75

11.

Various persons have from time to time contributed animals, flowers, shrubbery and other items, but no record has been kept thereof and the members of the Board are unable to now name any specific gift by any specific person.

12.

The persons who have had the administrative responsibility for operating Baconsfield Park during the period 1960 to 1966 are the individuals who were the members of the Board of Managers of Baconsfield Park during those respective years. They are as follows:

Charles E. Newton, Jr.	1960-1964
1268 Twin Pines Drive	
Macon, Georgia	
Mrs. Frederick Williams	1960-1964
Twin Pines Apartments	
Macon, Georgia	

Mrs. T. J. Stewart 2520 Vineville Avenue Macon, Georgia	1960-1964
Mrs. Kenneth W. Dunwody 4727 Rivoli Drive Macon, Georgia	1960-1964
Frank M. Willingham 1139 Oakcliff Road Macon, Georgia	1960-Present
Mrs. Francis K. Hall 1471 Peyton Place Macon, Georgia	1963-Present
A. M. Anderson 1293 Jackson Springs Road Macon, Georgia	1964-Present
Mrs. W. E. Pendleton, Jr. 1374 Twin Pines Drive Macon, Georgia	1964-Present
Mrs. R. A. McCord, Jr. 1386 Waverland Drive Macon, Georgia	1964-Present
George P. Rankin 920 Curry Drive Macon, Georgia	1959-Present
[176]	
Mrs. Dan O'Callaghan 1193 Oakcliff Road Macon, Georgia	1964-Present
Mrs. P. L. Hay (Now deceased)	1960-1963

13.

During the year 1963 the individuals who constituted the maintenance crew were employed and paid by the Trustee, and the Board of Managers has no record of their names, pay or functions. In addition to the individuals who were paid to perform maintenance services, the members of the Board during 1963 and at all other times have donated their own personal services without compensation and have done a great amount of actual maintenance and improvement work. During the year 1966 work continued to be done by various members of the Board, particularly Mrs. Francis K. Hall and the other female members of the Board; one regular employee, Roscell Johnson worked six days per week as weather permitted cutting grass, working in the flower beds, etc., and was paid \$1.25 per hour, James Howard was paid \$25.00 per week to pick up trash, etc., except when work was unusually heavy, he was paid extra.

14.

The Board has no minutes or other records upon which to base an answer to this interrogatory, and no member of the Board has any personal knowledge of any building being [177] built with Federal funds or the help of any federally aided program.

15.

The answer is the same as the answer to No. 14.

16.

During all of the period from 1955 to 1966 the Woman's Clubhouse in Baconsfield Park has been in the exclusive custody of the Woman's Club of Macon, a private organization, and the Board has no knowledge or information as to what organizations or groups may have been permitted to use the same by said Woman's Club of Macon. In answer

to subparagraph (f), no money has been paid to the Board of Managers for the use of that building, and the Board cannot answer as to whether any money has been paid to the City of Macon, but believes that it has not. In answer to subparagraph (g), the Woman's Club of Macon maintains the building and makes repairs thereto.

17.

There is no other building in Baconsfield Park itself which is used for meeting places for any kind of organization except the Woman's Club building referred to in answer to Interrogatory 16. There is a building located in the part of the property constituting the trust property which is designated by the will as being property to be used for income which is leased by the Board of Managers to the City of Macon, and the City has exclusive charge of the use of that building which it holds under lease, paying rent of \$25.00 per month which is the fair rental value thereof.

[178]

18.

No records are kept by the Board of Managers as to the number of persons who used Baconsfield Park during any year, and it is impossible to state the number of persons who used the same.

19.

Recreational facilities and equipment located in Baconsfield Park consist of outdoor tennis courts and basketball courts, softball fields with limited stands for spectators, and a small amount of playground equipment such as swings, see-saws, climbing bars, etc.

20.

No fees have ever been charged for the use of Baconsfield Park or for admission thereto, so far as is known to

the Board of Managers. It is the belief of the Board of Managers that the Woman's Club of Macon does make charges for the use by various organizations of the Woman's Clubhouse building, but the Board had no specific knowledge or information and no records as to such charges.

21.

Answered by the answer to No. 20.

22.

The Board of Managers of Baconsfield has charge of the property specified in Senator Bacon's will to be used for the purpose of income and does derive income from various leases of said property for income purposes. This income has been used exclusively for the care, operation, maintenance and improvement of Baconsfield Park as directed by said will. The funds representing income and constituting the funds used for those purposes which was in existence on the respective [179] dates about which inquiry is made were as follows:

(a) January 1, 1955	\$10,121.29
(b) January 1, 1964	\$17,382.61
(c) January 1, 1965	\$12,225.56
(d) January 1, 1966	\$ 7,460.57
(e) January 1, 1967	\$ 9,205.11

/s/ MARTIN, SNOW, GRANT & NAPIER
 MARTIN, SNOW, GRANT & NAPIER
 700 Home Federal Building
 Macon, Georgia

*Attorneys for the Board of
 Managers of Baconsfield.*

[180] GEORGIA, BIBB COUNTY

Personally appeared before the undersigned officer authorized to administer oaths, FRANK M. WILLINGHAM, who, after being duly sworn, states on oath that the facts stated in the foregoing answers to interrogatories, so far as they are based upon his own knowledge, are true, and that so far as based upon information and the knowledge of others, he believes them to be true.

/s/ FRANK M. WILLINGHAM
FRANK M. WILLINGHAM

Sworn to and subscribed before me,
this 13 day of February, 1967.

/s/ MERRY ANN FINCH (N. P. Seal)
Notary Public, Bibb County, Georgia.
My Commission Expires June 26, 1967.

(Certificate of Service Omitted in Printing.)

[182]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

SECOND SET OF INTERROGATORIES—Filed April 11, 1967

To: Board of Managers of Baconsfield Park
and
Martin, Snow, Grant & Napier, their
Attorneys of Record

Comes now, REV. C. S. EVANS, et al., intervenors, and for purposes of discovery, requires the Board of Managers to answer the following interrogatories within fifteen (15) days from the date of service, as provided by law, and that a copy of the answers be furnished intervenors' attorney, William H. Alexander.

—1—

State why the animals and cages were removed from Baconsfield Park in June 1964.

—2—

State whether the said animals and cages were sold or given away and give the name and address of the person, company, organization, or group to which they were given or sold.

—3—

If the said animals and cages were sold, state the consideration received for same.

—4—

State whether the Macon Woman's Club now pays or in the past [183] paid any rent for the use of the Woman's Clubhouse on Baconsfield Park.

—5—

If the answer to No. 4 is "yes," state the annual amount paid from 1955 to January 1, 1967, inclusive.

—6—

State the year in which the said Club first occupied or took control and possession of the said Clubhouse.

—7—

In further reference to the said Clubhouse, give the following information:

(a) Was a written agreement executed by the said Club in reference to use of the said Clubhouse? If the answer is "yes," attach a copy of said agreement to these answers;

(b) If the said Club did not execute a written agreement, state whether an oral agreement was made relative to the said Clubhouse and if so, give the terms of the agreement;

(c) Give complete details regarding how the said Club came to have exclusive use of the said Clubhouse, including, *inter alia*, the name of the park officials with whom the Club negotiated, the reasons for desiring the use of the said Clubhouse, etc.

This 10 day of April, 1967.

/s/ WILLIAM H. ALEXANDER
WILLIAM H. ALEXANDER
859½ Hunter St., N. W.
Atlanta, Georgia 30314

JACK GREENBERG
JAMES M. NABBIT, III
10 Columbus Circle
New York, New York

Attorneys for Intervenors

[185]

[Title Omitted]

ANSWERS OF BOARD OF MANAGERS OF BACONSFIELD PARK TO
SECOND SET OF INTERROGATORIES BY REV. C. S. EVANS,
ET AL., INTERVENORS—Filed April 21, 1967

The second set of interrogatories directed to the Board of Managers of Baconsfield Park by Rev. C. S. Evans, et al., Intervenors, are answered as follows:

1.

The Board of Managers contacted the City of Macon in October, 1961, and again in May, 1962, requesting that the animals be moved to a City owned park, Central City Park, but these requests were not complied with until sometime in 1964. The Board of Managers is unable to state whether the animals and cages were removed by the City of Macon in response to the previous request from the Board or whether they were removed by the City of Macon for the purpose of carrying out its policy, evidenced by its resolution of February 4, 1964, to resign as Trustee and to disassociate itself entirely from the operation of the park.

2.

The removal and disposition of the animals and cages was handled entirely by the City of Macon, so the Board of Managers of Baconsfield has no information from which to [186] answer this interrogatory.

3.

The answer is the same as the answer to No. 2.

4.

No rent is paid to the Board of Managers of Baconsfield by Macon Woman's Club for the use of the clubhouse, nor has any rent ever been paid for such use.

5.

None.

6.

The written minutes of the Board of Managers dating back to March 30, 1936, do not reveal when the clubhouse was first occupied, and the date is not within the knowledge or recollection of the members of the Board.

7.

The Board's records do not reveal any type of agreement, written or oral, in reference to use of the clubhouse; and the use of the clubhouse under the present arrangements was in existence before any member now on the Board became a member thereof, and the present members have no knowledge as to how said club came to have the exclusive use of the clubhouse, it being a situation which was already in existence at the time they each individually first became a member of the Board.

/s/ MARTIN, SNOW, GRANT & NAPIER
MARTIN, SNOW, GRANT & NAPIER
700 Home Federal Building
Macon, Georgia

*Attorneys for Board of Managers
of Baconsfield.*

[187] GEORGIA, BIBB COUNTY

Personally appeared before the undersigned officer authorized to administer oaths, FRANK M. WILLINGHAM, who after being duly sworn, states on oath that the facts stated in the foregoing answers to interrogatories, so far as they are based upon his own knowledge, are true, and that so far as they are based upon information and the knowledge of others, he believes them to be true.

/s/ FRANK M. WILLINGHAM
FRANK M. WILLINGHAM

Sworn to and subscribed before me,
this 19th day of April, 1967.

/s/ (Illegible) (N. P. Seal)
Notary Public, Bibb County, Georgia.

(Certificate of Service Omitted in Printing.)

[193]

IN THE SUPERIOR COURT OF BIBB COUNTY

(Title Omitted)

DEPOSITIONS OF MAYOR B. F. MERRIT, MR. CLEVELAND JAMES,
 MR. FRANK WILLINGHAM, MRS. MARY BUDD KEARNES, MR.
 LAWTON MILLER AND A. M. ANDERSON—FILED MAY 22, 1967,
 AND ORDER OPENING NOVEMBER 13, 1967

Macon, Georgia—10:00 A.M.—April 24, 1967

Depositions of MAYOR B. F. MERRITT, MR. CLEVELAND JAMES, MR. FRANK WILLINGHAM, MRS. MARY BUDD KEARNES, MR. LAWTON MILLER, AND MR. A. M. ANDERSON, called by intervenors before Hazel C. Farmer, Notary Public, Georgia, Bibb County; testimony taken at 700 Home Federal Building, Macon, Georgia, beginning at 10:00 A.M., April 24, 1967.

APPEARANCES:

For *Intervenors*:

E. S. Evans et al.:

MR. JAMES M. NABRIT, III,
 10 Columbus Circle,
 New York 19, New York.

MR. WILLIAM H. ALEXANDER,
 859½ Hunter Street, N.W.,
 Atlanta, Georgia.

For *Board of Managers of Baconsfield
 and Substitute Trustees*:

MR. GEORGE C. GRANT of Martin, Snow,
 Grant & Napier,
 700 Home Federal Building,
 Macon, Georgia.

*For heirs of Senator Bacon and
trustees under his will:*

MR. C. BAXTER JONES and
MR. WILLIS B. SPARKS, III of
Jones, Sparks, Benton & Cork,
500 First National Bank Building,
Macon, Georgia.

For City of Macon:

MR. TRAMMELL F. SHI of
Shi and Raley,
Southern United Building,
Macon, Georgia.

[194] STIPULATION:

All objections except as to the form of the question, RESERVED to the time of the hearing. Reading and signing of transcript by witnesses WAIVED by witnesses and counsel.

Depositions taken by agreement of counsel with all formalities being WAIVED.

The Witnesses are called for cross examination and for the purposes of discovery by E. S. Evans, et al., intervenors in this case pursuant to agreement of counsel. The depositions are being taken of members of the Board of Managers of Baconsfield Park, plaintiffs in the case, and certain officials of the City of Macon, defendants in the case. Counsel have agreed to waive all formalities and reserve all objections until the time of any hearing except as to the form of the question, and it has been stipulated that all parties will waive the signatures of the witnesses.

MAYOR B. F. MERRITT, JR., witness called by the intervenors, being first duly sworn, testified on examination.

By Mr. Alexander:

Q. Mayor Merritt, I believe you have been sworn, sir?

A. Yes.

Q. Will you state your full name? [195] A. B. F. Merritt, Jr.

Q. And what is your address, Mr. Merritt? A. 2470 Clayton Street, Macon, Georgia.

Q. I see, what is your official title or position, sir? A. Mayor.

Q. Mayor of the City of Macon? A. That's correct.

Q. How long have you been Mayor? A. I first went in office in 1953, November and served until November, '59 and from November, '63 to the present.

Q. When does your present term expire? A. November this year, 1967.

Q. Now, during the time that you have been in office, have you had the occasion to make decisions relative to a park known as Baconsfield Park? A. Not relative to the park because we didn't, I say we, the City did not actually control this park. The Board of Managers managed the park. The only decisions might be called upon that I can remember on any occasion was the question of action that the Board had taken which we had to make some query about, not that it might say called for a decision on our part except that maybe keep informed of what was being done there, although title was in the City, never in my experience had we actually controlled it.

[196] Q. You are familiar with the history of the litigation involved in this case with Baconsfield Park? A. That's correct.

Q. And you have some knowledge about the park? A. Yes.

Q. Let me ask this: What is the size of Baconsfield Park?
A. Now, you are getting a little technical.

Q. If you don't know the exact— A. I wouldn't know the exact acreage.

Q. Could you give us any kind of approximation? A. I don't know, I imagine 15 or 16 acres.

Q. When you say 15 or 16 acres, do you have reference to the total area of the park? A. The total area of the park, well, not considering all that was in Senator Bacon's trust agreement, but only that which was park.

Q. Well, would you describe for us as best you can the area that you stated constitutes the 15 or 16 acres? A. That which is on the north and west side of North Avenue and extends along side the river for I would say 1500 or 2000 feet and then approximately 5 or 600 feet back to what we know as Nottingham Avenue and then back to North Avenue.

Q. Are you familiar with the street known as Parkview [197] Drive? A. Parkview Drive, yes.

Q. The area that you just described, would that be the property bounded by Nottingham Road on one side, by Spring Street on one side and by Parkview Drive on one side and the river on the other side? A. That's correct.

Q. And it is your opinion that that area just described consists of about 15 or 16 acres to the best of your knowledge? A. Maybe more, not being a farmer I can't estimate acreage very well.

Q. Well, let me ask you this, would it surprise you if you learned that the area that you have just described consisted of some 50 or 60 acres? A. No.

Q. It wouldn't surprise you at all? A. No.

Q. I see. Now, is there any property located across the street from the area that you have just described, by across the street I mean directly across from Spring Street? A. Yes.

Q. Would you describe that property as trust property or income producing property? [198] A. That was income producing property which the Board has always in my experience, the City has never had anything to do with it.

Q. Well, let me ask this, could you give us an approximation of the size of that property that you just referred to? A. Well, if that other had 50 or 60 acres in it, I would say this was nearer about 10 or 12, smaller area.

Q. Is it possible to give us an estimation of how many blocks this so called trust property consists of? A. Well, I have always been under the impression that they only had a small piece down by the river, but it is more than I thought from recent plats that the Board controls, so I would say that it was about considering blocks, maybe two square blocks, what we know as an ordinary block which is 440 by 440.

Q. When you say ordinary blocks, are you referring to so-called city blocks? A. I am referring to a standard city block in the old City of Macon.

Q. During the time that you have been in office, has the City of Macon had the occasion to have the property that you have just described appraised? A. No.

Q. What value would the City of Macon put on that [199] land? A. Well, I don't know that the City could put any value on it. As I say, the City has never been concerned with it. It certainly wasn't considered, if you say as an asset of the City on account of its set-up. We didn't exactly include it. When I say we, the City didn't include it among their assets that were owned in fee simple, even though title did rest in the City on account of the way it was managed and controlled.

Q. Did the City have separate books relative to this property known as Baconsfield? A. No.

Q. Any transaction that the City engaged in relative to the park would be in the records of the City which also con-

tain transactions of other City business; is that correct?

A. It would only be considered in the light of what the City did in that particular department, I mean it wasn't set aside at all.

Q. During the time that you have been in office, Mayor Merritt, has there been any property which could be called Baconsfield Park trust property other than the two pieces that you have just described? A. No, not to my knowledge.

Q. So, the two pieces that you have just described [200] would be the entire area of land which could be described as Baconsfield Park or trust property under the will of Senator Bacon; is that correct? A. That is correct.

Q. Could you tell us very briefly in your own words what type of facilities are located on Baconsfield Park? A. On the northeast corner of the tract which is north and west of Spring Street, you refer to it, I would say North Avenue because it used to be that way after you cross the river was a school playground. Just to the west and down Nottingham Drive there were tennis courts which the Macon Tennis Club initiated and the Women's Club which faces Spring Street, the zoo or a building or two and a fence was there; and, when I say zoo, that was the monkey cage, I think, and maybe a few small animals was all it ever contained, and one little rock garden house down in the southwest corner. That's on the north and west side of the street. Was that the area you were asking about?

Q. Yes, I will get to this in a moment. I don't want to interrupt you, sir. Have you finished? A. Yes.

Q. Let me ask—Let's go off the record for a moment. A. Spring Street is what it is known as up to the [201] bridge and at the bridge North Avenue on north.

Mr. Nabrit: The street running by the front gate—

The Witness: Is really North Avenue, referred to originally as Spring Street, but we commonly call it North Avenue.

By Mr. Alexander:

Q. Let me ask this, what is the official name of the street; is it North Avenue? A. North Avenue.

Q. So— A. Many people say Spring because at the bridge Spring Street quits.

Q. So going from down town Macon, I guess this would be Riverside Drive toward the park would be Spring Street? A. That's right.

Q. Once you cross the bridge on the Ocmulgee River, it would then be North Avenue! A. North Avenue, correct.

Q. And it would be North Avenue that goes on— A. North Avenue goes on over the hill.

Q. So, when I stated a few moments ago about the land across from Spring Street as having, as being income producing property, technically that's property across from North Avenue? [202] A. Correct.

Q. Now, did you describe all of the facilities that are on the park to the best of your knowledge? A. Yes, I would know, that's all that is on there.

Q. And to the best of your knowledge, there has been no additional equipment or additional facilities on the park during the time that you have been mayor? A. No.

Q. Now, with reference to this zoo, you referred to it, I believe, as a monkey house; is that presently on the park? A. No.

Q. Can you tell us when it was first put on the park? A. No, I can't tell you when. I inherited it.

Q. And you took office in 1953? A. Yes.

Q. So, this zoo was on the park premises prior to 1953? A. That's correct.

Q. Can you tell us when the zoo was removed from the park? A. Either in—we had been in a discussion with the Macon Museum of Arts and Sciences, Junior Chamber of Commerce, in fact I had offered the zoo to several other people because we had discovered that we had a very bad

[203] tribe out there, the people in that particular business said were very unattractive and they were, and we tried to dispose of them and didn't have much success. So, the Junior Chamber of Commerce offered to take them off our hands, and I believe that was early '64, early '64 which they did, and we got out of the zoo business.

Q. What did you mean when you said or you made reference to a tribe? A. Well, this particular type of monkey, I don't remember what it was now, but it horrified the man that came to look them over that we had selected this particular tribe to have in a zoo.

Q. I see. A. Because about their most outstanding characteristic, I think, was their rapidity in which they produced out there, and we just got more monkies than we could use, and it was not a very—in the opinion of those who had to deal with it, a very attractive thing to have. I think maybe a few enjoyed them, but we didn't have much objection to getting rid of them.

Q. Can you give us some idea of the approximate number of monkeys you had? A. Oh, I think we had 40 or 50.

Q. Did you have other animals there other than monkeys? [204] A. Oh, a few small animals like rabbits and we had one or two deer at one time. We had a very old elk which gave us considerable trouble, what you might see in a children's zoo, maybe a squirrel cage.

Mr. Nabrit: Goats?

The Witness: I don't know whether we were unfortunate enough to have any goats or not. We may have, but I don't believe so.

Q. Could you give us an estimate of the total number of animals that you had? A. Oh, it wouldn't be—it would go in that same figure, 40 or 50 would probably include them all.

Q. Do you know whether you had any ducks? A. I think they did have a few ducks. I don't know where they came from. They might have just settled in the pond down there.

Q. What about peafowl? A. I think they had one, I don't know at what time, but I remember sometime in my day they had one.

Q. Any pheasants? A. I couldn't say whether there was a pheasant there or not.

Q. Now, these animals that you have just described, were they purchased by the City? A. Now, that I couldn't say. I know in my day I have [205] never authorized the buying of one. I guess you can infer that I was not a lover of this zoo.

Q. To the best of your knowledge, did the City at any time authorize or appropriate or spend any money for the purchase of any animals during the time that you were mayor? A. Not to my knowledge, I tried to sell some, but I made that deal.

Q. What about the maintenance of the zoo during the time you were mayor, did the City of Macon spend or appropriate money for the maintenance of the zoo? A. Well, I believe the Board on one or two occasions brought up the fact that we weren't doing a very good job of cleaning it up which we usually could spare work detail out of the public works department maybe to put it in a little better shape, but to my knowledge no specific request on any item. It wasn't that big, you might say.

Q. I see, who fed and took care of the animals there at the zoo? A. There was one elderly gentleman with the parks department, I believe.

Q. What was his name, sir? A. I couldn't tell you to save my life.

Q. He was an employee of the City? A. I believe he was, now, I couldn't be positive, and you can infer from my answers that this was, this operation [206] was one step

removed from what our normal city departments are and I didn't involve myself too much in the details of that park.

Q. But to the best of your knowledge one elderly fellow whose function it was to take care of the animals? A. I don't know on what basis he was really retained.

Q. But to the best of your knowledge, he was a city employee who looked after the animals? A. I would think he would be. I can't be positive about that.

Q. Yes, I am asking to the best of your knowledge. And to the best of your knowledge is he now employed? A. No.

Q. Has he retired or resigned? A. I couldn't tell you what happened to him.

Q. Can you state how many employees the City now has there at the park? A. None.

Q. All right, let me go back a moment to the zoo. I believe you stated that the animals were removed from the park in 1964; is that correct? A. I believe that was the date, it was in the middle of the year because, as I remember, because we had a consideration as to how we were going to get rid of them and what and who we would transfer them to.

[207] Q. And what group or what persons did you transfer them to? A. The Jaycees, Macon Jaycees, Junior Chamber of Commerce took charge of those monkeys.

Q. Did they take charge of all of the animals there or just the monkies? A. Just the monkies, I don't know what we did with the rest of them.

Q. What amount did the Jaycees pay the City of Macon for them? A. They didn't pay a thing. I almost—I didn't want to be too elated about it, but I may some day award them.

Q. Did you at the same time, the same year you got rid of the monkies get rid of the other animals, 1964? A. They had dwindled, I think the elk died. I think maybe the deer

had gotten away, there was no problem or it didn't come to me—whatever happened to them, they faded away, let's say.

Q. Do I understand then that the City did not receive any money or compensation or remuneration for any of the animals that were in the park they got rid of in 1964? A. None whatsoever. We didn't have much saleable merchandise.

Q. When you got rid of the animals, did you also get rid of the cages or did you retain the cages? [208] A. It wasn't—

Q. And the other equipment that was used with them? A. It wasn't of any value, the type cages we had there, and I don't think there was anything, I don't think the wire on those cages was worth reclaiming. If they did, the Public Works which took it down—there was not enough value, let me put it this way, for me to be concerned about it.

Q. Did I understand that the Public Works Department of the City of Macon in effect dismantled the zoo? A. Cleared it out on the request of the Board, to get it out of there.

Q. I see, so the Board made a request to get rid of the zoo; is that correct? A. Well, as they had from time to time because it was cluttering up the landscape.

Q. Did you have the dates that the Board made a request to get rid of the zoo? A. No, I don't. It was probably made verbally to me.

Mr. Jones: May I refresh his recollection?

Mr. Alexander: Yes, that's fine.

(Off the Record.)

The Witness: This was prior to the time. I knew they had requested it, as a matter of fact, they had requested it way back in my previous two terms that we move [209] this to Central City Park.

Q. Will you state again for us where this zoo was located on the park? A. Well, it was located on one of the streets through the park, I would say through the southwest of the center of what would be the center of that plat as near as I could pin it down, it occupied a little knoll right above the lily pond.

Q. Could you state where is that in relation to the present tennis courts? A. Oh, that's southwest of the tennis courts and from Nottingham Drive you might say it was directly behind it toward the river.

Q. It would be between Nottingham Drive and the river? A. Yes.

Q. Now, you made reference to a club house; is that club house on the park at the present time? A. Yes.

Q. And the club house was on the park during the time you were in office; is that correct? A. Yes.

Q. Will you state where the club house is located in reference to North Avenue and Nottingham Drive? A. It faces North Avenue south of where Nottingham [210] turns off North.

Q. Approximately how large is the club house? A. Oh, I would say it was, it contained one large room, three small across the front, and I have never been in the kitchen, so I wouldn't know what is back there. It is really just a large size dwelling you might say, and it has one large room across it, but it would be about the size of a ten room house.

Q. Is it made of brick? A. Brick.

Q. And how many stories does it have? A. One.

Q. One story? A. Yes.

Q. Does it have a basement? A. Not to my knowledge.

Q. What about an attic? A. I couldn't tell you about that.

Q. Do they have a garage? A. No garage to my knowledge.

Q. I see. Do you have any idea as to the size of the area

immediately surrounding the house that might be considered the yards of the club house? A. I couldn't pin that down because that's one of those things as I have stated that would be the Board of [211] Managers, we never have concerned ourselves with it.

Q. Is there a parking lot? A. There is a parking lot adjacent to it on the south side.

Q. Can you tell us approximately the size of that? A. Oh, it would take about 100 car capacity, I imagine.

Q. I see, now what year was the club house built? A. That I couldn't say.

Q. Was the club house on the property at the time you assumed office? A. Yes.

Q. Do you have any records of the City that would answer the question I just asked about the club house? A. I think maybe the Board of Governors have to my knowledge.

Mr. Jones: You said the Board of Governors, I don't recognize that term.

The Witness: I mean the Board of Managers.

Q. Does the City have any records which would show that? A. To my knowledge we have never been concerned with that club in any detail. I can't remember any point in my 10 years in office that it has ever come up about its operation. I have had no occasion to ever look at it.

[212] Q. So, you say that the City does not have any records which would give information about the club house? A. To my knowledge it hasn't.

Q. Can you state for what purpose is the club house being used at the present time? A. It is commonly referred to as the Women's Club and I have always considered and the City has always considered that that was their operation and we were not concerned with it; and, as I have stated

before, I don't know of any occasion in my experience where one matter about the club house has been referred to.

Q. What do you mean when you say it was their responsibility? A. I mean as far as we knew they were the operators of it, it has been my understanding even though this may not be factually correct that the Board of Managers may have had some say so, but my understanding, my personal understanding has been that they built it, they operate it and that's as far as I have had any occasion to go back.

Q. It is your understanding that the Board of Managers built it? A. No, the Women's Club.

Q. That the Woman's Club built it? A. Yes.

Q. Now, when did they build it? [213] A. I couldn't say when that was built, I would be guessing and I might miss 10 years.

Q. Can you give us the basis for your statement that the Woman's Club built the house, the club house? A. Well, some various conversations with members of the Women's Club. I have had to appear there many times at different functions that some of those which are not identified as the Women's Club express themselves about the problem they had of getting money or try to build a Women's Club.

Q. I see, the City would have had to take some action in order for the Woman's Club to build a club on City property, would it not? A. I don't think so, I mean if I had been in office I wouldn't have had anything to say about it because that is the general approach that the City has had on this thing.

Q. What I am getting at, it would not have been possible for a private club to build a house on public or city property without permission of the City, would it? A. If they asked, to my knowledge, I don't know as they ever asked, the Board of Managers ever asked for any official paper on this club or not. I don't think we have it on record at the

City. We certainly don't hold the deed to it, I will tell you that.

Q. You don't hold a deed to the club house? A. No.

[214] Q. But that club house is located on this property known as Baconsfield; isn't it? A. It is.

Q. Tell us this, what is the official name of the group that is now occupying the club house? A. Macon Women's Club as far as I know, that may not be technically correct.

Q. Can you tell us where the headquarters of this club is, whether it is at the park or some other place? A. I only assume that that is their headquarters. I can't keep up with all of the women's organizations in Macon.

Q. So far as you know, the headquarters of the Woman's Club is the Woman's Club House there on Baconsfield Park? A. So far as I know.

Q. Can you tell us the name of the president of the club? A. I cannot.

Q. Can you tell us the name of the vice-president? A. I couldn't tell you the name of one member right now.

Q. You cannot? A. No.

Q. Can you tell us the name of the person in the [215] club with whom you dealt in your various trips to speak at the club? A. No, that is covering too much territory. I couldn't identify some of those actually being a member of the club or something from their past knowledge or the club, and I certainly couldn't be specific enough to name a person, no.

Q. Let me ask you this, I believe you stated a few moments ago that you had been to the club on numerous occasions to speak during the time you have been in office? Is that correct? A. Yes.

Q. Were you invited there by someone? A. Yes.

Q. Who invited you? A. That I couldn't say because I usually—I was there Saturday night, but all that appeared on my appointment book is Macon Legal Secretaries As-

sociation, and as to who the individual was, I couldn't name them.

Q. When you say Saturday night, are you— A. This past Saturday.

Q. You are referring to Saturday, April 22, 1967? A. That's correct.

Q. You were invited there by a group known as the—what was the name of it? [216] A. Macon Legal Secretaries Association, not Macon, Georgia.

Q. They had a meeting there; is that correct? A. They had a convention, banquet.

Q. And did they receive permission from the City to have the banquet? A. No, I didn't know a thing about it.

Q. I see. A. Except what is on my book.

Q. I see, I understand then that you cannot give us the name of single person who is a member of the Woman's Club that uses the club house? A. No, I couldn't without—all I do is to be to keep a file to pull which would cover Woman's Club, but I wouldn't know who it was until I pulled it.

Q. How many members are there in the Woman's Club of Macon? A. I couldn't answer that question.

Q. Does the Woman's Club pay the City of Macon any money for the use of the club house? A. Never have to my knowledge or there has never been any discussion of it.

Q. During the time you were mayor, you never took steps to ascertain whether or not the club was paying any money for the use of the clubhouse; is that correct? [217] A. That's correct.

Q. Were you at all times aware of the fact that the Woman's Club was using that house? A. Yes.

Q. Were you also aware of the fact that the park was a public park? A. Yes, but I was aware of the fact that I didn't have much to do with it. It was controlled by the Board of Managers, by the Board that had always in my

experience, and it has been so long accepted in Macon that it was one of those points that I didn't feel I had to question anything.

Q. There is no doubt in your mind, is there, that the Woman's Club is a private organization, is there? A. No.

Q. Let me just ask once again, I don't want to misquote you, I understand that during your term of office that you have made numerous visits to the clubhouse; is that right? A. Yes.

Q. Would you say maybe you have been there maybe 10 or 15 times during the time that you have been in office? A. I expect I have been there but not to a Woman's Club meeting.

Q. Well, at the Woman's Clubhouse? [218] A. Yes.

Q. Now, during your numerous visits to the Woman's Clubhouse, there was some of those times that the Woman's Club was meeting; is that right or the Women's Club was meeting? A. No, I don't think I have even been to a Woman's Club meeting.

Q. These were meetings then of other— A. Other organizations.

Q. I believe you have given us the name of one organization. Can you give us the name of any other organization that has met there during the time that you have been in office? A. Georgia Milk Dealers Association.

Q. All right. A. On one occasion, several of the local associations of various types, I wouldn't remember their names or designations.

Q. I see, on your numerous visits to the club, did you at any time see any Negroes there as guests? A. I couldn't answer that.

Q. You don't ever recall seeing any, do you? A. Not off hand, no.

Q. This was during your whole time in office? A. That's correct.

[219] Q. To the best of your knowledge, did the Woman's Club ever pay any taxes to the City for the use of that club-house? A. No.

Q. Never paid any tax based on any kind of income? A. No.

Q. To the best of your knowledge? A. No.

Q. Do you know whether the Woman's Club ever charged groups for the use of the club house? A. I am quite sure they do, but I wouldn't know what it was.

Q. The City never received any of that income? A. No.

Q. Now, during the time that you have been in office, did the City of Macon have the occasion to make various improvements on the park? A. The only improvements that I might say that we actually—other than—well, this was in conjunction with a request of the Board of Governors, Managers, I called them the Board of Governors, we dumped some surplus dirt down there around a low place over toward Spring Street that used to be a little, almost a little branch that we filled in, and other than what from time to time in the normal operation of the park might have done something in [220] conjunction with the park. There has been no project as such improvement.

Q. Where was this area located in the park? A. It was a little low place between where the Women's Club is and Nottingham Drive.

Q. I see, approximately how much dirt fill did you place there? A. Well, it was all we had at the time, I imagine it was 100 or 2 truck loads, regular dump trucks.

Q. 1 to 200 truck loads; is that correct? A. Yes.

Q. And approximately what would that cost the City? A. I couldn't tell you because it was done just in the normal operation of the public works department which was included in the general budget and which there is no details.

Q. I see. A. Of accounting kept on it.

Q. The City had to purchase the dirt, though, didn't

they? A. No, I don't think so. I think that was some we fell heir to somewhere.

Q. Do you know where you fell heir to it? A. Not off hand, it could have been in the repaving of the North Avenue, Gary Highway over there that we had [221] some surplus dirt.

Q. What year was that that you filled in that area with 100 or 200 truck loads? A. Oh. '55 or '56.

Q. In addition to the fill that you just described, did the City at any time make other capital improvements on the park during the time that you were in office? A. I don't know of any that we made an appropriation for which would require if we were doing any project, there might have been a few things that might have been done in parks or public works which in their normal operation they can handle, but it wouldn't have been a project as such.

Q. I see. Who in your opinion would have detailed information relative to all of the capital improvements that was made on the park? A. I don't think there was any from the period 1953 to '59, there were no available funds for such capital improvements and the only ones that were made in that period were made out of the general obligation bond of 1956 and parks was not included in it.

Q. Let me ask this, are you saying then that you know as a fact that no capital improvements were made on the park during the time that you have been in office?

Mr. Jones: Are you talking about made by [222] anybody or by the City?

By Mr. Alexander:

Q. Made by anybody? A. Oh, now, there might have been some made by other people, but we made no appropriation for any capital improvement.

Q. The City made none? A. No, none during that period.

Q. Do you know whether or not there were capital improvements made by others during the time that you were in office? A. Well, it couldn't have been very big because other than you might say somebody scraping off this fill where the kids play baseball. It is not a real baseball field, but it is level ground.

Q. It was levelled during the time that you were in office? A. Yes.

Q. Who paid for that? A. I don't know, we dumped, we put the dirt in there. Now, who levelled it off, I don't know because I thought they were going to put some more dirt in there. This is my recollection and they didn't. I happened to leave town for two weeks or so and came back and it was that way. We simply were assisting in this particular job, [223] and I didn't think they had gotten it up to where it was out of the water, but it was and it was done, and I don't know. Our public works people told us that they said that is all that they needed.

Q. I see, and what year was that? A. That was about '55 or '56, I can get the years mixed up and there were some improvements on the tennis courts. To my knowledge there was nothing except just maintenance on that so-called zoo.

Q. Back to the basketball courts, how much dirt did you— A. Not basketball courts, just an open ditch that was there between the two places where they play baseball now.

Q. Baseball? A. Yes.

Q. Are you referring to the 100 to 200 truck loads that you referred to a few moments ago? A. Yes, same area.

Q. Same thing? A. Yes.

Q. What about the tennis courts, how much money was

spent? A. I couldn't, I couldn't say. I think the Macon Tennis Club did most of that. We may have assisted them in [224] the electrical department with the light connections.

Q. I see. Now, what about the streets and sidewalks there at the park? How much did the City spend for streets and sidewalks during the time you were in office? A. We only had—during the time I have been in office, we only had one section which we kind of restored which is considered a public thoroughfare through there and other than that, there has been no sidewalks.

Q. What section was that? A. This was a roadway connecting up Nottingham Drive.

Q. Did it connect Nottingham Drive with something or was this on Nottingham Drive? A. With this street that goes in by the Women's Club.

Q. Is that North Avenue? A. No, it runs off North Avenue.

Q. I see, do you know the name of it? A. Lee Boulevard, it makes a turn into Nottingham Drive.

Q. And what did you do to that strip, resurface it? A. We restored it a little bit because the Board of Managers had cut it which they did sometime about, before I went in office in '53, I believe it was, and which they elected to do so.

Q. They elected to cut it? A. That's right.

Q. What do you mean when you say cut it? A. I mean take it out and cease to be a thoroughfare through there.

Q. All right, and the City restored it; is that correct? A. After a lot of conversation.

Q. What do you mean by conversation? A. I mean that the citizens on either side of it had been using it for some time and didn't like to travel the route to North Avenue,

and it gets to be regardless sometimes of what other people do, it gets to be a political question.

Q. What did the citizens use this for in the neighborhood? A. Just as a more direct route to North Avenue.

Q. From what point? A. From Nottingham Drive.

Q. I see, so they would use this as a thoroughfare to go from their homes it was? A. Yes, let's say it was a short cut to stay out of traffic up there.

Q. I see, so the City accommodated them by rebuilding that strip; is that correct? [226] A. Well, I don't know whether you would say it was exactly accommodation because we were faced on one side with the public who had been using it and were faced with the Board of Managers who had a right to do what they did, but we did work out an agreement with them that we would put it back.

Q. What did that cost, cost to restore it? A. I couldn't tell you off hand.

Q. Do you have records with you that would reflect that? A. No, I don't know whether it could be defined because there is another question that we put it in, the public works put it in and it was not done by contract.

Q. Your public works department put it in? A. Yes, and it would be included in the general budget.

Q. Is it possible for you to get for us some information relative to the amount of time that the public works department spent in building that and the area of land involved? A. Well, it could be done by an engineer, but specifically identifying it, I don't think anybody in the world could do it.

Q. You wouldn't have any records in the City which would reflect the area that you rebuilt or resurfaced? [227] A. Oh, I think we could determine the area because the

engineer could probably identify it by the looks of it, where there is usually a break you can tell it.

Q. Let me ask you this, would you supply for us then at the earliest time convenient for you an estimate of the size of the area that was resurfaced and the cost involved? A. Well, I think we could certainly get the estimate of the size of the break, but I am doubtful whether we could come close other than an estimate.

Q. An estimate as to cost based on the number of work hours? A. What it cost that particular year.

Q. And what year was that? A. I am not sure, probably it is on these records, but I know it was around '55 or '56, somewhere around there.

Q. I see. What is the total amount of money that the city of Macon spent for lights during the time you were in office, lighting of the park? A. Now, that I know we never would be able to determine.

Q. Would or would not? A. Would not.

Q. Why not, why wouldn't you? A. Well, except just counting the lights and saying—[228] because we had no lights in there except the, what would normally be street lights which cost us \$3 a month with the power company.

Q. I am referring to installation of lights now. What did the City of Macon spend for the installation of lights? A. We didn't spend anything on the installation of lights, unless it was on the tennis courts there were some that were furnished by the City.

Q. How many lights were installed on the tennis courts by the City? A. I couldn't answer that question. That's an overlapping thing.

Q. Would you say there were sufficient lights there on the tennis courts to enable a person to play tennis at night? A. Oh, yes.

Q. And these were installed by the City? A. Or the

Macon Tennis Club, I think they had coin boxes on them. I am not a tennis player and I couldn't tell you.

Q. Are you saying then that the tennis club may have installed some and the City of Macon may have installed some? A. Yes.

[229] Q. Do you recall what year the City installed them? A. I think they were there prior to my term of office.

Q. Are the lights still there? A. No, they may still be there, but I wouldn't know about it.

Q. So far as you know, they are there; is that correct? A. Well, I don't know whether they are or not. I am just observing in passing.

Q. Let me ask you this, do you have any personal knowledge that the lights which had been installed by the City were later taken down? A. We took some of the stuff and moved to Tatnall Square Park where we have other tennis courts.

Q. You say you took some of the stuff, you mean some of the lights? A. Some of the lights and some of the equipment which if the City engineer, I mean the city electrician if it was worth it, but I couldn't answer that question.

Q. Was all of the equipment taken from the park to put in the other park, what was the other park? A. Tatnall Square.

Q. Tatnall Square Park, was all of that equipment removed from Baconsfield to Tatnall Square Park? [230] A. We didn't have any equipment to move.

Q. What is it that you moved, let me go back a moment, what did you move from Baconsfield Park to Tatnall Square Park? A. I said there was a possibility that the city electrician if he needs it, he can cannibalize the other things that we are not using and do it, and he may have. I couldn't say.

Q. Did he move anything other than lights from Baconsfield Park? A. We didn't have anything else to move.

Q. All right, now, the lights that he removed from Baconsfield Park to Tatnall Square Park—

Mr. Jones: Wait just a minute, I do want to object to that because he has stated that simply as a possibility entirely without his knowledge, and you refer to lights which were moved.

Mr. Alexander: Let me rephrase the question.

By Mr. Alexander:

Q. Is it your opinion that lights were removed from Baconsfield Park to Tatnall Square Park? A. I don't think it would have been worthwhile unless the City electrician, as I say, wanted to cannibalize some particular thing.

Q. Let me ask this, what is the basis of your statement [231] that the engineer may have done that? A. Well, because I think if he had had such a need, he might have presented it, but in this particular instance and operation of the City, it was not one of those things other than getting anybody out of the park that was operating and we weren't in too much detail because we didn't have too much. We didn't have much except land that we had a title but not operational control.

Q. Let me ask this, what is the total amount spent by the City on basketball courts during the time that you were in office? A. Basketball courts?

Q. Yes. A. Nothing has ever been in the City budget.

Q. What about the baseball diamond or bleachers? A. No, the bleachers, those bleachers over there weren't built by the City, built by whoever was playing there.

Q. Did the City spend money in maintaining the bleachers? A. No.

Q. Did the City spend money in maintaining the tennis courts or baseball diamond? A. No.

Q. Or basketball courts? [232] A. Nothing.

Q. What about the tool sheds and what not that were on City property, what did the City of Macon spend for the maintenance of those? A. Very little, if anything. As a matter of fact, I don't know whether—the only one standing is that rock house that was in the park originally and I don't even know whether it was used as a tool shed or not.

Q. What do you mean? A. Or ever was.

Q. Describe this rock house? A. Well, it is a little one room rock house built down near the lily pool, never been in it, don't know what it is.

Q. Is that used as a tool house? A. I couldn't answer that. I just presumed it is for general utility house, but I wouldn't know what it was.

Q. Let me ask this, what does the, what was the yearly amount appropriated or spent by the City for the general upkeep of the park, by general upkeep I mean such things as keeping the grass cut? A. There was no appropriation ever made directly to Baconsfield Park in my term of office.

Q. Now, at no time during the time you have been in office, was there any money appropriated for the maintenance [233] of Baconsfield? A. No, we don't appropriate on any park with the exception of Central City Park and we don't do that in the case of the park part.

Q. You have had city employees, though, who have done work in maintaining it? A. That's correct.

Q. On the average how many city employees did you use per year in keeping up the park? A. I couldn't answer that question because it was only on a, you might say, in addition to all other parks that we had that they might clean up, prune or whatever they did in the same capacity that they did on other parks.

Q. How many persons did you have working full time there at Baconsfield Park? A. None full time that would be specifically assigned to that park, not as far as the parks committee or the executive department was concerned.

Q. Who is in charge of the Macon Parks Department? A. Mr. Cleve James is the head of the Parks Department.

Q. Is he here today? A. He is. However, the Parks Committee of City Council is also in that picture.

Q. Can you give us the names of the persons who are [234] on that committee? A. Well, the people that are on that committee have never been in the operation of this park on any budget. Sydney Pyles is chairman of that committee, but he hasn't been operational as far as Baconsfield Park is concerned because he hasn't been in there since the beginning of '64, so he would have no knowledge. Now, who the others are in other—I couldn't say.

Q. Can you give us the names of the persons who were on the committee between 1963 and 1964? A. That would be a matter of record, I can't give it to you off hand, off the cuff.

Q. Can you state whether Mr. James would head the Parks Department during that time? A. He was.

Q. All right, now, during 1967 approximately how many city employees have you had on the average in maintaining the park? A. In 1967 in Baconsfield?

Q. Yes. A. Not the first one.

Q. What about during the year 1966? A. No.

Q. You haven't had any during the year 1966? A. No or '65.

[235] Q. Well, now, what about the playground on Baconsfield Park, how many city employees have you had on the playground during the year, 1967? A. None. The playground that is on there is that school playground which I don't have anything to do with.

Q. Which school playground? A. Alexander 4.

Q. Alexander what? A. Alexander 4.

Mr. Miller: 3.

The Witness: Three, I am sorry.

Q. Alexander T-h-r-e-e (spelling)? A. Yes. No. 3.

Q. What is the name of the school, official name of the school, Alexander School No. 3? A. Alexander School No. 3.

Q. What kind of school is that? A. It's an elementary school.

Q. Is that a public or private school? A. It is public.

Q. Elementary school? A. Yes.

Q. Where is the school located? A. Right across Nottingham Drive.

Q. Opposite the park? [236] A. Yes, opposite.

Q. Does the school face Nottingham Drive? A. No, I guess you would have to say that it was cater-cornered, it is on North Avenue at the corner, opposite corner.

Q. And that park, this playground is used by the school; is that correct? A. That's correct.

Q. And is it also used by the public school system generally or is it limited to that one school? A. Well, I think most of them are open, whoever happens to go there.

Q. Now, how many city employees did you have working on the playground during the year 1967? A. On that playground?

Q. Yes. A. None.

Q. No school employee was assigned to the park? A. No, not to my knowledge. School employees, I wouldn't know about the school, but under our system, I mean the city does not have anything to do with the operation of the school system.

Q. Let me ask this, is the recreation department a part of the City of Macon? A. Yes.

[237] Q. That would come under your jurisdiction? A. That's correct.

Q. Did you have any member of the recreation department assigned who worked at the playground during the year, 1967? A. No, we stopped that in February, 1964.

Q. Let me ask this, did you have any employee of the recreation department who worked on the playground during the year 1966? A. No.

Q. Mr. Merritt, did you have the occasion to answer some interrogatories which the intervenors, E. S. Evans, et al. propounded to the City of Macon in December, 1966, January 1967? A. Yes sir, we did, 1966, December.

Q. Do you recall having answered those, I believe you answered them on January 6, 1967. Do you recall that, sir? A. I do.

Q. Let me read to you question 15 from the interrogatories which the intervenors filed. 15: "State the annual operating and maintenance cost of Baconsfield Park for each year from January 1 to December 1, 1966 inclusive." Now, I believe you answered as follows on January 6, 1967: "The City has no information on which to [238] base an answer to this question. This is a matter solely within the knowledge of the Board of Managers. No separate records were kept in connection with maintenance work done by the City employees. One employee of the recreation department of the City of Macon worked on the playground which was situated in the park and received a salary from the City in the amount of approximately \$1181.70 per year." Do you recall that answer? A. Yes, I remember the question.

Q. Do you recall having given that answer? A. That's right.

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Q. Now, do you still say that there were no employees of the recreation department who worked during 1966 on the playground in Baconsfield Park?

Mr. Jones: Was your question '66?

Mr. Alexander: Yes sir, January 1 to December 1, 1966.

Mr. Jones: Will you read question 15 then.

Mr. Alexander: Yes sir.

Mr. Jones: You haven't read the question.

Mr. Alexander: I read it once, and I will read it again. Let me read the question again to make certain we are clear. Question 15: "State the annual operating and maintenance cost of Baconsfield Park for each year from January 1 to December 1, 1966 inclusive."

[239] Mr. Shi: Each year?

Mr. Jones: That's one year.

Mr. Alexander: Well, I am reading the question as it is. This is the question as it was worded.

Mr. Jones: Excuse me, go ahead.

By Mr. Alexander:

Q. And the answer was given as I have just quoted?
A. Well, the answer that was understood and that we figured out as I understand was all the annual cost was when we were operating? Isn't that right?

Mr. Shi: That's right.

The Witness: All it ever had been there.

Q. Can you say, sir, whether or not during 1966 you did or did not have employees from the recreation department on the playground? A. The order that we sent out dated

in February or March of 1964 that every city department on whatever basis, they were going in whether to help out on request of the Board, that no city employee would be employed on that park, after this decision came down.

Q. Mr. Mayor, what decision are you referring to? A. Well—

Q. You say after the decision came down? A. Well, when resigned as trustee and we couldn't comply with the terms and we couldn't expend any public money.

[240] Q. Then as I understand it, you sent out an order in 1964 it was? A. Right.

Q. Advising the various city departments not to expend additional funds in Baconsfield Park, but notwithstanding that, you did have one employee who worked in the recreation department in 1966? A. No, our understanding was what it had cost us and we had had one which was a part time employee that had been on the payroll and I believe that was the average figure, wasn't it, Mr. Shi?

Mr. Shi: That's right. May I interpose here that your question, if you don't mind.

Mr. Alexander: All right, sir.

Mr. Shi: Because I assisted him in preparing that answer, and your question says for each year from January 1 to December 1, 1966, and all through here you have been using the years 1954 to 1966, and that answer relates to the period prior to 1964 which is covered by answer to No. 12 wherein we say no City funds have been expended directly or indirectly since June of 1964, and that each year was taken to mean the entire period, not just 1966.

Mr. Alexander: So the \$1181 is for the 10 year period prior to that?

[241] Mr. Shi: It is the average prior to the cessation date in February of '64.

By Mr. Alexander:

Q. Mr. Mayor, does the Alexander School still use the playground on the park? A. I am sure they do.

Q. The City at no time sent out instructions to the school system— A. No.

Q. To keep them from using the park? A. No, that wouldn't be in the prerogative of the City.

Q. What use does the City make of the park, do you know? A. To my knowledge none except during school hours, whatever activity they might have of that kind.

Q. Do they have recreational activities after school hours or do you know? A. I presume they do to some extent, but what I wouldn't know. I mean because all I am positive of is what had gone out from the City is that no one with any department is to participate in any maintenance work or even in an advisory capacity, recreational or otherwise on the property which is controlled by the Board of Managers of Baconsfield Park and that's February of '64.

Q. Now, during the time that school is in session, [242] do the teachers or staff members of the school escort the students over to the park? A. I can't answer that question, whether they do or whether they don't. I hope they do.

Q. Do you know whether the children are supervised at the time they are on the playground? A. I would think generally in the Bibb System they are supervised.

Q. Who would supervise them? A. Some member of the school faculty.

Q. During the period that the City had employees working at the park which is an average of \$1181 was spent, what did that employee do at the park? A. Well, I would presume that they would just act as the City's agent on

the ground to see that there was a little activity going on and also most of them, these part time workers on the playground are simply to look after the little ones and see that nobody gets hurt. I would not say that they were responsible for all of the activities at all because it would be beyond their capabilities.

Q. Did you have more than one person working? A. No.

Q. Just one person? A. Yes.

Q. And this person would supervise the children [243] playing on the playground? A. Not supervise, most of them don't. They usually—let's say an attendant or you might say a baby sitter.

Q. I see, so the person referred— A. That is my personal opinion.

Q. The person referred to then in answer to No. 15 interrogatory is someone who may have served as sort of a baby sitter to use your term; is that right? A. Well, I know that it can't be much more than that for what we were paying.

Q. And in addition to that, as I understand your testimony this morning, there were other persons who from time to time did general maintenance work on the park, is that correct? A. On that particular park, I would imagine some.

Q. What kind of maintenance work did they do?

Mr. Grant: What period are you inquiring about?

Mr. Alexander: I am referring to the period—

The Witness: Up to '64.

Mr. Alexander: —of time that Mayor Merritt was in office.

Mr. Jones: Well, that extends on up to today.

Mr. Alexander: Right.

The Witness: Well, as I have indicated in so

[244] many of my answers, Baconsfield didn't receive any more attention than some other park in the City, and what was done there was only done as part of the general work or on request of the Board of Managers, and that terminated in 1964. I don't remember the Board of Education ever requesting anything about this specific part of the park you are talking about, but at one time they did request or say they were going to do something, but they did it themselves and never even asked us about where they were going to put it.

Q. Who is that, who asked? A. The Board of Education or representatives of the Board.

Q. When did they ask you? A. The question if we would put that basketball court and we deferred our answer and they answered it by doing it themselves.

Q. So the basketball court was built by the public school system of Macon is that right? A. As far as my knowledge, we didn't do it. I know we didn't do it.

Q. But during the time that you have been in office, as I understand it then, you had various people from the parks department who would do general maintenance work on the park, things like cut grass and what not; is that [245] right? A. Just like they did in Third Street Park.

Q. Cut grass, did they plant flowers? A. They may have planted flowers.

Q. Would they do general maintenance work on the trees there in the park? A. I don't know to the extent they would do anything about trees and they certainly wouldn't have unless the Board of Managers asked them because we didn't get into the details of that.

Q. They have a pond on the park; is that right? A. Yes.

Q. They would clean the pond out when necessary; is that correct? A. I don't know. I don't know whether it ever needed it, but I don't know.

Q. Let me ask this, what about the trash; the City would remove the trash from the park, wouldn't they, when it needed it? A. Well, we remove that everywhere.

Q. And you do it at the park I mean? A. Yes.

Q. Mr. Merritt, does the City at the present time occupy, have possession of any buildings which are owned or controlled by the managers of Baconsfield Park? [246] A. None whatsoever.

Q. Does the City of Macon lease any building from the park? A. None.

Q. During the time that you have been in office, has the City of Macon ever rented any structure for \$25 a month from the Board of Managers or the park? A. We rented on that commercial part of the lease, I think we authorized \$300 a year for that old building which was the Tuberculin School, that's the only one we ever had any lease on.

Q. The City pays the Board of Managers \$300 a year; is that correct? A. That's correct.

Q. Would you describe the building that you are referring to, sir? A. Well, it's an old open air tuberculin school which was just one big room, I would say about 40 by 60 and one little anteroom. We made arrangements for the local club, Macon Civic Women's Club to set up a club there and which they on their own got various contributions and restored it enough to hold a few meetings in it, and that's the extent of it. That was in the commercial part of the park.

Q. I see, you say the commercial part, are you [247] referring to the land which is— A. Which is east of North Avenue.

Q. I see, which is directly across from park property; is that correct? A. That's right.

Q. Is that building still in existence? A. It is still in existence.

Q. The City as of 1967, in fact as of this date, is still paying \$300 a year; is that correct? A. We paid \$300 to the club and as far as I know that lease has never been changed.

Q. The City paid \$300 to the club? A. I don't know whether they paid it to the club, I can't answer that, it has been so long ago, but to my knowledge it hasn't been changed.

Q. The City paid \$300 to someone; is that correct? A. That's right.

Q. Does the \$300 go to the board of managers? A. I believe it does.

Q. Does it go directly from the City to the Board of Managers? A. I think, I believe I am correct on that because I did the preliminary conversation when they first went there.

Q. Let me ask this, does the City have a contract [248] with the Board of Managers or a lease with the Board of Managers for that yearly? A. I frankly don't know whether we have a lease or not. It was kind of a half hearted arrangement you might say.

Q. What was the year this arrangement was made? A. '54 or '55, it could have been either one of those years.

Q. Will you state for us what the building is being used for at this time, at the present time? A. I am not certain that it is still operating in the same manner, but it was—they called it the Happy Hour Club. It was a meeting these Macon Civic Women's Club held for the old people, 65 or better.

Q. Is this the same club that occupies the club house?

A. No.

Q. On the park? A. No.

Q. It is a different club; is that right? A. Yes, this was a young group of women or were when I went in there.

Q. What is the name of the group? A. Macon Civic Women's Club, Macon Young Women's Civic Club.

[249] Q. Does the Macon Young Women's Civic Club pay the City any money for the use of that? A. No.

Q. Does the club have its headquarters there in the building or is it elsewhere? A. Elsewhere.

Q. What is the address of the headquarters? A. I couldn't tell you.

Q. Can you tell us the name of the president? A. I couldn't tell you, all of my contemporaries in that club are out.

Q. Does the City pay for the upkeep and maintenance of that building? A. No.

Q. Who pays for the upkeep and maintenance? A. They have solicited, that was one of the agreements they went in there on, that they would get donations from business firms and others to keep it up, and as far as I know there hasn't been any other request except for us to keep people from breaking in over there.

Q. Did you comply with that request? A. We try, but we are not making much—

Q. How do you try to comply with that request? A. Well, by having police officers check it out because it is not occupied very much of the time, and it is [250] in a rather bad location with that woods over there just behind it to keep vandalism down.

Q. Does the Woman's Club pay any taxes for the use of that building? A. For this operation?

Q. For the building that— A. No.

Q. They pay no taxes? A. No, just a meeting house.

Q. Does the City maintain guards to provide police protection for the park itself? A. No, the city—nothing but patrol cars in the area.

Q. Patrol cars go through the park occasionally? A. I would think that they would.

Q. Now, does the City pay insurance on the park or any of the equipment on the park? A. None, never has.

Q. Never has at any time? A. No.

Q. What about the property you have just described which is used by the Young Women's Club, does the City have insurance on that building? A. No, the City doesn't have. I don't know who—

Q. Can you give us a valuation of that building? A. Well, unless it is used of a specific purpose [251] like it is being used, it might be worth 5 or \$6,000 for somebody to start on to do something with it, but it wouldn't be in shape to put a price on it commercially.

Q. Is that a brick building? A. Brick building.

Q. How many rooms? A. One little kitchen and another little room, and that's all there is to it, just a box like structure.

Q. One story? A. One story.

Q. Is Baconfield Park completely tax exempt? A. Well, not on the lease—

Q. I am referring now to the park? A. The part of the park, no.

Q. The park part is completely tax exempt? A. Yes.

Q. All of the equipment on the park is tax exempt? A. Yes, to my knowledge.

Q. To your knowledge is the clubhouse tax exempt? A. I couldn't answer that since we had our new study. We have just recently completely a tax re-evaluation program.

Q. When did you complete that, sir? A. We completed that last year.

Q. 1966? [252] A. Yes, in July, June or July.

Q. So far as you know—let me ask you this: During the time that you have been in office, do you know of any occasion which the City or the County or the State has taxed the clubhouse on Baconsfield Park? A. I don't know that.

Q. Now, about the trust income property which is across from the park, what is located on that property at the present time? A. Well, I can't say all that is located, I don't even know the northern boundary. There is a filling station, a drug store, several other buildings, but I wouldn't try to identify those which don't fall in my business.

Q. Can you name for us a few of the stores there? A. Well, Chichester's Pharmacy, Shell Oil off hand.

Q. What was the last one, sir? A. Shell Oil. Pure Oil used to be on it but it has been vacant for some time and there is a little ice cream—I wouldn't know the name of it.

Q. Would you say that those places constitute a shopping center? A. I would so consider.

Q. Now, is that property in the shopping center tax exempt? A. No.

Q. The persons who operate the business pay the taxes; [253] is that correct? A. That's correct.

Q. Is that property a part of the property that is controlled by the Board of Managers? A. That is correct.

Q. And that property is also the property that is vested in the City of Macon as trustee; is that correct?

Mr. Jones: Now or earlier?

By Mr. Alexander:

Q. Under the will, under Senator Bacon's will? A. Now, I don't know whether it was or not. I would have to have

a little legal advice because I had some down there I thought was but it wasn't near the river.

Mr. Jones: May I answer the question?

By Mr. Alexander:

Q. Let me rephrase the question and I might clarify it. The property which now consists of what you refer to as the shopping center? A. Yes.

Q. Was the property that the City of Macon held as trustee at least prior to 1964 at the time the Bibb Superior Court allowed the City of Macon to resign as trustee; is that correct? A. Well, I have never considered that we had anything to do with that which was east of North Avenue, across that street as far as Baconsfield is concerned it was [254] described separately and we never had any interest or control of it.

Mr. Jones: I will be glad to answer that question if you wish.

Mr. Alexander: All right.

Mr. Jones: The property that you are referring to was definitely included in the conveyance under the will to the City as Trustee, still, of course, merely as trustee. It has been that way continuously until the City resigned. They were separately described; that is, it was isolated from the park use property and designated for the production of income and placed under the control of the Board of Managers. Is that an adequate answer to your question?

Mr. Alexander: Yes, sir.

Mr. Jones: I am not speaking for the Mayor now, I am speaking from the record, the facts which I know.

The Witness: Well, I know this, we have never been concerned with it insofar as operation.

Q. Let me ask this: Are you familiar with the house which at one time was occupied by a person by the name of Custis Nottingham? A. Only out of history books.

[255] Q. Do you know which house he occupied at one time? A. I don't think it is there.

Q. Has it been in existence during the time you have been in office? A. No, that comes under ancient history.

Q. Will you state whether or not the home that was occupied by Senator Bacon during his lifetime has been in existence during the time you have been mayor? A. No.

Q. Do you know the year that was removed from the park? A. I couldn't say.

Q. Let me ask this: Do you know what part of the property that his home was once located? A. Only approximately.

Q. Will you state for the record the approximate location of it? A. Well, it was to the west of North Avenue, but I don't remember exactly where.

Mr. Nabrit: Near the clubhouse area?

The Witness: Somewhere set back in there, but I never have tried to identify the exact spot.

Q. Do you know whether any of the buildings presently in existence on Baconsfield were in existence [256] at the time Senator Bacon died? A. I would say not.

Q. You think all of the buildings which are now on the park were built since his death? A. Well, there isn't but one, and I don't think there is any question about it.

Q. Do you know the year that building was constructed? A. No.

Q. Do you think that the building was built in say the late thirties or the early forties or can you give us an approximation? A. I mean just guessing I would say the thirties, in the thirties, but that would be as close as I would want to identify it.

Q. Do I understand then that the City at no time made any expenditures for the construction of the clubhouse or any other structure on the park? A. Not to my knowledge.

Q. What agency or department of the City would have records which would reflect whether or not the City made any contribution to the construction of the club house? A. Well, the City Clerk's office is the only office of record that the City has but I have never seen any [257] reference to it nor in the 10 years that I have been in office has it ever been brought up which I think it would have. I don't think we have ever had any right to question who built it, how they built it or what they did with it.

Q. Let me ask this, Mr. Mayor, as mayor of the City if you for any reason have the occasion to try to ascertain who built the park, who built the clubhouse on the park that the City of Macon was acting as trustee, what source would you use to obtain that information? A. Board of Managers.

Q. Mister Mayor, have you at any time held any prior position with the City of Macon? A. Not with the City.

Q. Have you held any position with the County? A. Not with the county.

Q. What about the State? A. I have been a legislator.

Q. What years? A. '39-'40.

Q. Do you have personal knowledge of any State legislation which has ever been enacted relating to Baconsfield Park? A. None except during this litigation and in reading and I don't remember the State ever having any.

Mr. Shi: He said State Legislature?

[258] The Witness: State Legislature, no, I don't know of any.

Q. What about a City ordinance? A. Very few and I would say that I haven't always lived with the exception of some years in school and service being away, that it has been generally accepted that the Board of Managers operated this Baconsfield Park, and there have been very few occasions other than being sure that we didn't do too much in this park over the years regardless of what years it was, that we haven't been particularly concerned as city officials with the operation of this park. It has been somewhat of secondary consideration because really we haven't been politically responsible, isn't that all right?

Mr. Jones: It sounds all right to me.

The Witness: There has always been an intervening authority.

Q. During the time that you have been mayor, do you have occasion from time to time to appoint various members to the Board of Managers of Baconsfield? A. If I have appointed one, I don't know it. I don't know whether I was supposed to, you know.

Mr. Jones: You were supposed to fill vacancies if any, but I don't think there were any.

The Witness: I don't think they ever had one [259] during my time.

Q. During your term of office, you don't recall there ever having been a vacancy on the Board of Managers; is that correct? A. If I did, it went this far, the Board of

Managers told me who they wanted and that's who we put on because that's how little we delved into the operation.

Q. During the time that you were in office, sir, were various easements granted to utility companies for access to Baconsfield Park? For example, Georgia Power Company?

A. That didn't happen in my administration. The only—let's see, no, I can't remember any utility that we had to go in there.

Q. There are at the present times various, in existence various easements across Baconsfield Park; is that correct, power lines?

A. There is one, and I don't think—it is across park land, I don't think it was ever considered, or you might say was in the park, that's the Georgia Power Company, and we do have a sewer easement in there, in that same land, big outfall sewer.

Q. You also have several tall towers, power lines?

A. Power Company.

Q. That's correct? [260] A. Yes.

Q. And that's true of the land which is a part of the park also, isn't it?

A. Yes and just adjacent to that we have a big outfall sewer in there.

Q. Who granted the easement for the sewer, was the easement granted to the City?

A. The Board of Managers.

Q. The Board of Managers granted an easement to the City?

A. Yes, certainly.

Q. Did the City pay for that?

A. I don't think so, I hope not.

Q. Did the City use its power of condemnation to obtain this?

A. No.

Q. Was that by agreement with the Board of Managers?

A. You mean the power company.

Q. No, I am referring now to the sewer easement?

A. That was by agreement.

Q. By agreement between the City and the Board of Managers? A. That's correct.

Q. Now, can you state whether or not at the present time there is a State or Federal Highway going through [261] part of Baconsfield Park? A. Interstate Highway 16.

Q. Interstate Highway 16? A. Yes.

Q. Now, can you state whether or not the City sold any land to the Highway Department? A. That was between the Highway Department and the Board of Managers.

Q. Did the City at any time give a deed to the Highway Department for the right of way of a highway through the park? A. I think we might have had to finalize it. The State Highway Department condemned it. I don't remember if we ever gave title. Yes, that came about after—we didn't have anything to do with it, that's right. They—

Q. Do you recall what year the Highway Department took steps to acquire title to the land through the park for the purpose of building that highway? A. I don't know, sometime in—that would only be a guess because they are just now completing it, and they have been about a year and a half on the job.

Q. Just now completing the highway? A. That's correct.

Q. Let me ask this: To the best of your knowledge did the City of Macon ever receive any funds as a result of [262] condemnation on the part of Baconsfield Park? A. None. In fact, they didn't even let me know how much they got for it.

Q. Who did not let you know? A. I don't know that they necessarily had to, bu' I don't know until this day what they got if they got anything on the condemnation.

Q. When you say they, are you referring to the Board of Managers? A. Board of Managers.

Examination by Mr. Nabrit:

Q. Do you know who put the playground equipment such as swings, see-saws, climbing bars, etc. on the playground at Baconsfield? A. No, that was there when I went in office, and I wouldn't know.

Q. When the school board constructed the basketball courts, what did they build there; did they asphalt it? A. They asphalted and put in some goals.

Q. Put in some basketball baskets? A. I don't know who built it, but I assumed that it was the School Board, the athletic facilities.

Q. Were there any other facilities that they set up at that time? [263] A. No.

Q. Just the basketball courts? A. As far as I know.

Q. How many basketball courts are there, do you know? A. I don't know.

Q. Has the City—

Mr. Grant: I am going to object to an extended interrogation by a second counsel for the intervenors. I think you ought to restrict it to one. He has gone on about two hours now, and a lot of us have other appointments. Mr. Alexander assured me that we were going to be through in time for a motion for a new trial I have got at 3:00 o'clock and Mr. Shi has got something at 2:30 and Mr. Willingham has got some kind of appointment, and I think if we are going to start over again with another counsel, we will be here indefinitely. Let's stick with the one that started it.

Mr. Nabrit: That will probably take longer for me to tell him my questions, but I don't mind.

Mr. Grant: Well, you have been doing a pretty

good job of telling him so far, but I just don't think we ought to go over everything else again.

By Mr. Alexander:

Q. Did the City install the storm sewer there on Baconsfield Park? [264] A. Storm sewer?

Q. Yes. A. There was an existing drainage line down there which was a natural drainage line, I don't know whether there is a storm sewer in there or not except a culvert underneath North Avenue. I don't believe there is a storm sewer in there.

Mr. Grant: The sanitary sewer.

Mr. Shi: He is talking about the sanitary sewer, I imagine.

The Witness: There is a sanitary sewer, a big outfall.

Q. That was installed by the City? A. By the City.

Q. Was the City paid for that? A. By who?

Q. Did anyone pay the City to install that? A. No, this is a big outfall that is a collector line that serves all of that area.

Q. What about the curbing there at the park? A. I don't know about that. That was there when I went there.

Q. Did the City spend any money to install a sprinkler system in the park? A. Not to my knowledge.

[265] Q. What about the gate which is at the entrance to the park; did the City spend any money for that? A. No, that was there when I went with the City. I don't know how it got there.

Q. I believe that gate entrance was built in 1956? A. If it did, we didn't build it.

Q. I see, I believe the gate has the year 1956 on it! A. Yes.

Q. What about paving around the park or the walkways or sideways or anything, did the City spend any money for that? A. Not to my knowledge, not in these years anyway.

Q. I see, to the best of your knowledge has there ever been any grant of any Federal, State or County funds for the operation of Baconsfield Park? A. No, and none have been requested either.

Q. What about any type of project performed by any Federal Governmental agency? A. Not to my knowledge, I wouldn't know of any.

Q. Were you serving as Mayor, sir, at the time the Board of Managers filed the law suit which is the subject of this pending case? A. No, I wasn't no, no.

Mr. Jones: That was filed during Mayor Wilson's administration.

[266] Mr. Alexander: May, 1963.

Mr. Jones: He went in office in November.

By Mr. Alexander:

Q. Will you state, Mr. Mayor, the name of the person who was mayor at the time this law suit was initiated? A. Mayor Edgar Wilson.

Q. Do you know his address, sir? A. Mailing address Mercer University, I don't know his home address.

Q. Does he live in Macon at the present time? A. Yes.

Q. Is he connected with Mercer University at the present time? A. Yes.

Q. Will you state what his position is? A. I don't know what his title is.

Q. Were you Mayor at the time the City of Macon resigned as trustee? A. Yes.

Mr. Alexander: That's all.

Examination by Mr. Jones:

Q. Mr. Mayor, a number of questions have been asked you with reference to the use of this property and the management of this property as if it were public property. Has [267] this property ever been considered by the City as a part of its domain, public domain under its use and control? A. Not in any administration that I have been concerned with. We didn't have that feeling exactly because we didn't have control of the property.

Q. Was the Title of the City of Macon for the limited purpose of acting as trustee to hold title? A. That was my understanding.

Q. Reference has been made to this surplus dirt that was used to fill in some low places and possibly level out the baseball diamond or something of that sort, when you refer to surplus dirt, are you referring to dirt that the City had surplus that it had to dispose of and simply disposed of at the nearest and best available place to get rid of it? A. That is the usual custom where we have some to move for some reason, we try to locate the closest place possible.

Q. Is that sometimes done to private property owners to get rid of the dirt? A. Well, wherever anybody will let us dump it. There was a time that it was a little difficult, but lately we are finding there is a great demand for it.

Q. This particular dirt, was that dirt that the City had to dispose of and get rid of? A. Yes, sir, that was dirt that we had either picked up [268] and wanted to get rid of.

Q. Mr. Mayor, reference has been made to the public school which has used this park for playground purposes. Does the City of Macon have any control at all over the public school system here in Bibb County? A. None whatsoever.

Q. Are you generally familiar with that set up? A. I am serving as ex-officio member of the board.

Q. You serve ex-officio by reason of the fact that you are mayor? A. That's correct.

Q. Do you happen to know that that is an independent corporation chartered by the Legislature in 1872 and operated continuously since that time by the corporation created by the Legislature independent of the City and the County? A. I very well know it, sir.

Q. Does the City actually contribute any tax funds for the operation of the public school or does the county contribute such as is contributed locally? A. The City does not contribute.

Q. Reference has been made to taxes, I believe you have stated that the so-called commercial part of this property or shopping center or whatever you call it is taxed and does produce taxation for the City? [269] A. Yes.

Q. And to the fact that the park has been exempt from tax, is a public charity exempt from property taxes in Bibb County and the City of Macon and generally in the State of Georgia? A. Same as other church property, Salvation Army.

Q. That has no relation to the fact that it may or may not be operated as a park or for any particular purpose, simply so long as it is operated for a charitable purpose? A. That's correct.

Mr. Jones: That's all the questions I want to ask him.

Examination by Mr. Shi:

Q. You were asked, Mr. Mayor, whether or not the City was paid to install this sanitary sewer line and outfall. Is the City ever paid for installing such sanitary lines and outfalls? A. You mean are we paid by somebody else?

Q. Right! A. No.

Q. You said that that line was placed on Baconsfield by agreement with the Board of Managers; is that correct?

A. Yes.

Q. When the City ordinarily installs a sewer line across [270] property which it owns in fee simple as part of its public property, would they have to consult with anybody about installing a sewer line? A. No, but we would in this case because as I have indicated, the Board of Managers has always insisted on their prerogative and even if we didn't we would have consulted with them to be sure we didn't get into any problem.

Q. You consulted with them because you figured they were the beneficial owners of the property? A. That's right.

Mr. Shi: That's all.

Mr. Grant: I don't have any questions.

Re-Examination by Mr. Alexander:

Q. Just 1 or 2 more questions in regard to what you have just said, do you, Mr. Mayor, consider the Woman's Club as a charitable group; I am referring to the club— A. The Women's Club?

Q. The Woman's Club or the Women's Club, whatever the title is, that occupies the club house on the property? A. In the same respect that the Exchange Club and the Rotary Club and other people who are or take civic projects of various kinds, yes.

[271] Q. In your capacity as ex-officio member of the Board of Education; is that the City Board of Education? A. No, county.

Q. County Board of Education? A. Yes.

Q. Do you have here in Macon a separate City Board of Education? A. No, never have.

Q. In your capacity as ex-officio member of the County Board of Education, do you attend meetings of the board?
A. Yes.

Q. Are there any Negro members of the Board? A. No.

Q. Are you familiar with the composition of students at the Alexander School that you referred to earlier this morning? A. Not specifically.

Q. Do you know of your own knowledge there are any Negro students in that school? A. I don't know if they are or if there are not. They are in some 15 or 20 or more.

Q. Well, let me ask this, would you say to the best of your knowledge as an ex-officio member of the board that the Alexander School that you referred to, I believe as [272] Alexander No. 3? A. Yes.

Q. Is a predominantly white school? A. Predominantly white.

Q. If not totally white? A. It would be predominantly because it is a neighborhood school.

Q. The neighborhood surrounding Baconsfield Park is a white neighborhood would you say? A. Yes.

Q. Is your answer yes? A. Yes, on all three sides you might say that are accessible.

Q. The fourth side being the side of the river; is that correct? A. That's right.

Mr. Alexander: We have no further questions.

[273] MR. CLEVELAND JAMES, Witness called by the Intervenors, being first duly sworn, testified on

Examination by Mr. Alexander:

Q. Will you state your full name, sir? A. Thomas Cleveland James.

Q. And what is your address, Mr. James? A. 1361 Wa-verland Drive.

Q. Is that Macon? A. Macon.

Q. What is your present title or position, Mr. James? A. I am superintendent of parks and cemeteries for the City of Macon.

Q. How long have you occupied that position? A. Oh, about 48 years.

Q. Were you holding the same position that you now hold at the time that Senator Bacon died? A. No.

Q. When was your first contact with the park known as Baconsfield Park? A. Well, it was when Mr. Glynn Toole was mayor, the last term he was in office.

Q. Will you spell the Mayor's name, sir? [274] A. Glynn Toole.

Q. How do you spell Toole? A. T-o-o-l-e (spelling).

Q. Do you remember what year that was? A. No, not exactly, it was around about the Second World War is when it was.

Q. Will you state for us briefly what your duties are? A. What?

Q. Will you state for us very briefly what your duties are in the position that you hold? A. I built all the parks practically and I just took over the cemeteries about 7 or 8 years ago and I have to cut the grass and tend all the playgrounds now, four cemeteries and 75 parks.

Q. 75 parks? A. Including the small parks and everything.

Q. I see, you are the general superintendent of all of the parks? A. That's correct.

Q. Now, in your capacity as parks superintendent have you served as superintendent of Baconsfield Park? A. That's right.

Q. Can you state the year that you first exercised control as superintendent of that park? [275] A. I don't know

what year, Glynn Toole was Mayor, the exact date, I don't know. It was just a wilderness then, just started from scratch.

Q. I see. Will you state whether or not during 1967 you exercised control and supervision over Baconsfield Park, during 1967?

Mr. Jones: May I interrupt, Mr. James does not hear very well, and you asked about the year '67 and I hope he will be certain to hear your question.

The Witness: What did you say? Talk a little louder.

Q. Let me rephrase the question. Have you during the year, 1967, exercised supervision or control of Baconsfield Park? A. No.

Q. Did you during the year, 1966? A. I don't think so, I think it has been about four years ago when they give it up.

Q. Do you recall whether or not you exercised control during the year 1964? A. I don't think so, I think it was before that, I am not sure about the date now.

Q. Do you recall why you ceased exercising control of the park? A. The Mayor told me not to work over there any more.

[276] Q. Did he give you any reason why? A. I didn't ask him.

Q. What in effect did the Mayor say? A. Nothing, that's all he said, and I said, "All right, that ends it."

Q. What did he say? A. What did who say?

Q. The Mayor? A. He just told me not to work on the Baconsfield Park any more that we were through with it.

Q. And prior to the time that you received these instructions from the Mayor, you would exercise general supervision of the park; is that correct? A. That's right.

Q. Now, did you have persons under your control working on Baconsfield Park? A. Yes.

Q. How many persons did you have? A. Well, at different times, sometimes I would have one and sometimes 4 or 5 and sometimes—just different times according to what I had to do, just like on the other parks. I operate them all the same way and the cemeteries too.

Q. Do you have persons who were assigned specifically to Baconsfield Park? A. Do what?

[277] Q. Did you have persons who were assigned to this specific park? A. No, no particular man at all, only one man that kind of watched around there, tended to the monkeys and the zoo and one thing and another, and that is the only one that had a regular job there.

Q. And what was his name? A. Oh, he is dead now, I have forgot what his name was, he has been dead several years.

Q. How long did he work there at the park? A. He did?

Q. Yes, sir. A. He worked about four years, I imagine.

Q. And he was a full time employee? A. Yes, sir, he was.

Q. Did you replace him after he died? A. No.

Q. What were his duties, sir? A. Whose duties?

Q. The person that you referred to that is now deceased? A. Well, he just took care of the zoo and cleaned up around there and kind of a watchman more than anything else to keep people from stealing anything.

Q. I see, did he do general maintenance work on the park; did he cut grass? [278] A. He didn't no.

Q. You had other persons to do that? A. Yes sir.

Q. These other persons, did they also maintain the club house? A. No.

Q. They didn't have anything to do with that? A. They didn't have anything to do with the club house.

Q. What would they do in addition to cutting grass? A. That's all and fertilize and plant winter grass in the winter

time, just general upkeep, I did all the planting years ago and just general upkeep, maintenance, that's all we did.

Q. At the time that you took over the supervision of Baconsfield Park. I believe you stated that it was a wilderness; is that correct? A. That's right.

Q. What did you do to build it to its present form? A. I had to go in there and go to work tearing it out and laid off a park in there.

Q. Can you be more specific, exactly what did you do to change it? A. Cut all the underbrush out, that's all, and cleared it up and laid off some paths through there and dug some [279] lakes and just made a general park out of it, paths and bridges and that was it.

Q. How did you build the paths, sir? A. Just cleared them out with some men, cleared out the undergrowth.

Q. Did you pave the paths? A. No, no.

Q. Did you lay bricks in the paths? A. No.

Q. How did you— A. Just dirt paths.

Q. Just dirt paths? A. That's right.

Q. And what about streets in the park, did you— A. Didn't have any! You mean the one highway through there, that through highway? No, I didn't do that. I laid them off, but I don't know who built those things. I was tending to other work.

Q. You say you laid off the highway? A. To show where it was going through there, yes sir.

Q. What do you mean when you say you laid it off, sir? A. What?

Q. What do you mean when you say you laid it off? A. I just showed them where to put it, that's all.

[280] Q. I see, and who did you show where to put it? A. Some fellow come up there and said he wanted to build a road through there, I don't know who it was, I have done forgot who it was.

Q. Was he a City Employee? A. No.

Q. Did he work for some private company? A. He didn't work for me.

Q. Did he work for some private company? A. No, I don't know, I didn't ask him.

Q. In addition to cutting the trees and etc. down, what else did you do to build up the park? A. That's all there was to it and put out shrubbery.

Q. Did you build any ponds on the park? A. Just dug out the place and the water come right on in it from a spring.

Q. I see, did you pave or cement the pond? A. No, dirt bottom.

Q. Just dug a hole; is that correct? A. That's correct.

Q. How large a hole did you dig? A. Oh, about half as large as this building, I reckon. How deep it is?

Q. Yes. A. About four feet deep.

[281] Q. About four feet deep? A. That's right.

Q. Approximately how— A. One of them is about four feet and the other one is about two feet.

Q. You had two ponds? A. Two small ones, yes, a little bigger than this room the two of them.

Q. I see. Did you use machines to dig out these— A. No.

Q. Ponds? A. No, just a shovel and threw it out to one side.

Q. I see, did you put benches or seats there in the park? A. The Board of Managers did, they bought some benches later on and put in there and we made a few out of stone to start with.

Q. Who made those, sir? A. We had a man with that crowd putting them in there.

Q. You mean the City had someone to put them in? A. No, it was PWA labor.

Q. Beg your pardon, sir? A. PWA labor.

Q. PWA labor put in— A. WPA.

[282] Q. WPA? A. Yes.

Q. Put in benches? A. Yes, just a few stone benches, that's all.

Q. Now, what year was that, sir? A. I don't remember, about, the same, when Mr. Toole was mayor.

Q. Now, did the people from the WPA do other work there in the park? A. About it, clean up, like I said, cut the underbrush down, and that's all there was to it and they built a few little benches.

Q. Were you in control or did you supervise the WPA workers? A. Yes.

Q. I see, and what about things such as tool sheds or what not, did the WPA workers build those? A. Built what?

Q. Any tool sheds? A. Well, we had one tool house and that's all, the kids would get out of the rain up under it was the main thing, and the builders could get out of the rain too, we didn't have many tools there.

Q. But this tool shed was built by WPA? A. No, we hired a man to do that.

[283] Q. Beg your pardon, sir? A. We hired a brick layer to do that.

Q. Who hired the brick layer? A. He was on my payroll.

Q. And you paid the brick layer from City funds? A. That's right.

Q. Did the WPA crews build any other structure on the park? A. No, that's all.

Q. I see, approximately how long were the WPA crews there on the park? A. Oh, I have no idea.

Q. Would you say as long as a year? A. Well, probably so, I expect it was.

Q. Would you say perhaps two years? A. I don't think so, it wasn't that long.

Q. Could you state perhaps a year and a half? A. See, they had them scattered all over Macon just working all of them all over Macon, just took some and put over there.

Q. I see. A. We had some down at Central City Park and the Stadium and Tuff Springs around school yards and every which direction all around Macon we had them, and I brought some over there and went to work on that.

[284] Q. Were these persons from the WPA or the PWA? A. WPA.

Q. WPA? A. Yes.

Q. Now, did the crews from the WPA do any work on the tennis courts? A. On the what?

Q. Tennis courts? A. Not as I know of, I didn't have anything to do with that.

Q. Did they have tennis courts? A. The recreation department probably did that.

Q. Did they do any work on any of the basketball courts? A. Not under me they didn't.

Q. I see. A. I didn't have a thing in the world to do with them on that, the recreation department did that.

Q. I see. Will you state whether or not at the time the WPA was there on the park that the house which is now called the Woman's Clubhouse was in existence? A. No.

Q. It was not in existence? A. No. I don't remember that now. I didn't have a thing in the world to do with that house, building the [285] house.

Q. I see. Well, in what year was that clubhouse built? A. I couldn't tell you that.

Q. It was built when you first went to the park, was it? A. No, no.

Q. So it was built since then? A. That's right.

Q. And you had general supervision of the park at the time it was built; is that correct? A. That's right.

Q. You don't recall which year it was built? A. No.

Q. Can you tell us who was mayor at the time that club house was built? A. Glynn Toole.

Q. Mr. Toole? A. Glynn Toole was still mayor.

Q. Can you tell us the last year that he served as mayor? A. No. Let me see who followed him, I think it was Charlie Bowden, I think he was the next mayor. He was there 10 years and then I don't know who come after him.

Q. I see, what year did you go to work for the City, sir? [286] A. 1915

Q. And what did you do when you first started to working for the City? A. What did I do?

Q. Yes sir, what was your position at the time? A. Superintendent of parks.

Q. Superintendent of parks? A. Yes sir.

Q. That is the only position you have ever held with the City of Macon; is that correct? A. That's right, not recreation, I didn't have anything to do with recreation, just parks.

Q. Let me see if I understand this now. Approximately which year did you first start working on Baconsfield Park? A. What year?

Q. Yes sir. A. I couldn't tell you.

Q. But it was not during the first few years that you were in office; is that correct? A. Who?

Q. It was not during the first few years that you were in office? A. No, no, gracious, no.

Q. How long had you been working on the park prior to [287] the time that WPA started working there? A. For the City?

Q. Yes. A. Since 1915.

Q. No, what I mean is how long had you been working at Baconsfield Park? A. I didn't work at all.

Q. Approximately how long had you been working on Baconsfield Park prior to the time that the crews from

WPA started working on the park? A. The same day I started.

Q. I see, you started working at Baconsfield the same time that the WPA started? A. Toole told me he was going to send some men over there and to start a park and that is what I did.

Q. I see. Now, can you tell us who built the Woman's Clubhouse? A. No, I don't know.

Q. Did you see the Clubhouse as it was being constructed? A. Yes.

Q. Were they city workers? A. I saw them when they tore the house down, Mr. Bacon's house where they tore it down, where the house is now, they tore it down and built the club house there.

[288] Q. Was Senator Bacon's family home on the same spot where the club house is now? A. That's what they say, now, I never had seen it, they said it was his home.

Q. They said his home was on the same spot? A. Right where the club house is now. That's what they say. I never had seen Mr. Bacon. He died before I ever knowed anything about the park.

Q. And you saw them while they were building the club house there? A. Oh, yes.

Q. Were they city employees building it? A. No, no city employees.

Q. Was it a contractor? A. I don't know.

Q. Were there a large number of workers? A. Well, about 5 or 6 or 10 probably to have the house built, brick layers and carpenters, there wasn't too many.

Q. Did any of your workers attend to any of the fills there on the park? A. Do what?

Q. Did any of your workers attend to any of the fills there on the park, such as the playground or the tennis courts or anything like that? [289] A. No. I didn't have anything in the world to do with that.

Q. You didn't roll the land or anything there on the tennis courts? A. No.

Q. Or the basketball courts? A. No, never touched it.

Q. Who did that, sir? A. The recreation department, I reckon, it was out of my jurisdiction. I didn't have a thing in the world to do with that.

Q. Can you give us an idea of approximately how many hours your employees spent there at Baconsfield Park? A. No, no idea, we didn't keep any separate count of no park or no cemetery or no anything, it all goes in one lump sum, and I get a certain appropriation for the parks, certain for the cemeteries, certain for Central City Park, I have got three different ones, and it is everything combined in each department, what I spend in cemeteries it goes in that department, and the parks goes in that one, nothing was itemized, no separate park.

Q. I see, can you give us some idea of the number of hours your employees would work at Baconsfield Park, just a rough estimate? [290] A. No, when they worked, they worked nine hours.

Q. Nine hours per day? A. Yes.

Q. And how many employees did you have working on the average day? A. Oh, sometimes I wouldn't have any, sometimes I would have one and sometimes two and sometimes five, and when they get through they are off and gone somewhere else. I didn't try to keep up with them at one particular place.

Q. I see, now, what about the fellow who is now deceased who worked full time attending to the zoo. How much did you pay him? A. Oh, then I think he was making about \$30 a week, something like that.

Q. And I think you said he worked about four years; is that correct? A. I imagine something like that.

Q. Now, were you supervising the park at the time that this woman's clubhouse was completed? A. Yes sir.

Q. Who moved in after it was completed? A. Who moved in?

Q. Yes sir. A. Nobody moved in, just had a club and had meetings there.

[291] Q. Had a meeting there? A. That's right.

Q. Was that under your supervision and control? A. No, I didn't have a thing to do with it.

Q. Who controlled that club house? A. I don't know. All I did around the club house was keep the grounds up in front and back there, that's all. As far as the house itself, I didn't have nothing to do with that.

Q. What is the amount of appropriations for your department, current year? A. Now?

Q. Yes sir. A. Well, it's about \$80,000.

Q. \$80,000? A. Yes.

Q. What about 1962, what was the appropriation of your department? A. I have no idea.

Q. You don't recall, sir? A. No.

Q. Would you say it has increased over the years? A. Oh, yes, see, I have taken over more now. See, I have even got highways now to keep up, and, of course, as the years go by the more it adds to your work.

[292] Q. I see, can you give us the approximate amount of your budget during the year in which this club house was built? A. No, I have no idea. I make my appropriations from year to year, make it out, and if they see fit, the finance committee sees fit to give it to me, I get it; and if they don't, I don't. That's all.

Q. Well, let me ask this. Which department of the City has had control or supervision of the Woman's Club house? A. I have no idea, nobody in my department has.

Q. You don't know who has control? A. No, I sure don't.

Q. Who is in charge of the recreation department for the City of Macon? A. Now?

Q. Yes sir. A. Well, Mr. Bob Wade is chairman and Patat is the superintendent of it, of the playgrounds.

Q. What is the last name? A. Patat.

Q. Spell that, sir? A. P-a-t-a-t-t (spelling).

Q. What is his first name, sir? A. I don't know, his office is at the city hall.

[293] Q. And what is his title? A. Superintendent of recreation.

Q. Superintendent of recreation? A. Yes sir.

Q. Did you have the responsibility for the installation of any of the lights on Baconsfield Park? A. No.

Q. What about any of the equipment such as swings? A. That's under playgrounds, that wouldn't come under me at all.

Q. You had nothing to do with any of those? A. No.

Q. Did you ever have flower displays there at the park or gardens? A. No garden, the whole thing was beautiful everywhere no one spot, it was all over the place.

Q. I see, approximately how much would you estimate that your department spent for flowers there in Baconsfield Park? A. Mighty little, I raised most of them.

Q. You raised them? A. Yes, and people gave them to me, just go out in the woods and get wild azaleas and put out there and give them to me.

Q. Where did you raise them, sir? [294] A. I had a green house over there.

Q. City green house? A. Yes.

Q. Where is the City green house located? A. It is not located, it is down. It rotted down.

Q. It rotted down? A. Yes.

Q. But at the time it was in existence you would raise them; is that correct? A. That's correct, we bought some, we didn't buy so many. A lot of people would give us things to put over there.

Q. What else did they give you besides flowers? A. Well, a lot of people would give us things to go in the zoo

and a lot of things like that. Mr. Happ was interested in that park and he used to buy a lot of stuff and give me.

Q. Who was that? A. And Mr. Murphy.

Q. Mr. Murphy? A. Yes.

Q. He would give you a lot of things? A. He bought a lot of things for the zoo, ducks and pheasants and one thing and another.

Q. Who is Mr. Murphy? [295] A. He is dead.

Q. Who was he, sir? A. Murphy, Taylor and Ellis real estate.

Q. Do you have any idea of the amount of money spent by the City for flowers? A. No, it wasn't too much.

Q. Can you give us an estimate, sir? A. Well, I would say about everything complete because other people gave us so much and other things, I would say a rough estimate was about \$5,000 maybe.

Q. \$5,000 per year? A. No, the whole business.

Q. The total? A. Yes.

Q. During which year, sir? A. During all the years.

Q. From what time to what time? A. When we started.

Q. Do you recall the year? A. I just told you when Mr. Toole, Mr. Glynn Toole was mayor, I didn't recall the date, no.

Q. And that would be from the time you started up until what year? A. That's right.

Q. Until what year, sir? [296] A. Until I quit 3 or 4 years ago, about 4 years ago.

Q. I see, now, what about the money the City spent for fertilizer? A. Well, the Board of Managers got that, paid for that.

Q. And what about grass seed? A. Same thing.

Q. And what about shrubbery? A. They paid, they bought a lot of that, a lot of trees. That's what I say, the City didn't spend too much, it was given to us and got out in the woods and got.

Q. I see, and once the Board of Managers purchased that, the City would plant them; is that correct? A. That's right.

Q. And the City would cultivate and maintain the flowers and shrubbery, etc.; is that correct? A. That's correct.

Q. During the time that you had the WPA crews, did you deal with particular persons at the WPA? A. Did I deal with them?

Q. Yes. A. Sure, I was working them all the time all over Macon.

Q. Who was in charge of the WPA crews? A. Oh, I don't know, the headquarters was down there [297] on Cherry Street. They changed around so much. I was working about 600 of them all over Macon, everywhere.

Q. Who was the person who was generally in charge of them? A. Well, they changed engineers, they had an engineer come one time from Atlanta and send another man down and here they go, just like that, every time I would go down there there would be a different person down there. All they would do is send the men over there and I worked them.

Q. I see, you would deal with the engineer who was in charge; is that correct? A. He was on the WPA himself, engineer.

Q. And you would deal with him; is that correct? A. That's right. All he did was furnish me the men, and I did the work.

Q. Do you recall the name of this person you dealt with? A. No, I don't.

Mr. Alexander: We have no further questions.

Examination by Mr. Jones:

Q. Mr. James, the WPA that you refer to, I believe I am correct in my understanding that they were trying to find work? A. That's right.

[298] Q. For a large number of people at that time? A. That's right.

Q. And the City under your jurisdiction helped them find the work? A. That's right.

Q. Did you or the City have anything to do with paying them? A. No, we didn't pay them anything.

Q. You did select the places where the work was available? A. That's right.

Q. Was that limited to parks or did it include all sorts of properties? A. Anything, anything, tear buildings down at Central City Park, do anything you asked them to do.

Q. Did it extend to school grounds, for instance? A. I didn't have anything to do with school grounds, at one time I did.

Q. I am talking about the WPA now? A. Yes, I am talking about WPA, only time I worked them on the school grounds and that was at Gresham High School, I got them to tear a wall down for me, and that's all.

Q. And is it generally true that the WPA was just used by you wherever you could find some work for them to [299] do? A. That's right.

Q. And that was the policy of the program at that time? A. That's right.

Q. Now, you referred to the recreation department having jurisdiction over certain things and doing certain things; do you know any—did you have anything whatever to do with the recreation department? A. Not a thing.

Q. Do you simply mean to say that you had nothing to do with the playground features of it? A. That's right.

Q. Do you know who did, whether the Board of Managers or private concerns? A. No, I don't.

Q. Or the public? A. No, I don't.

Q. You just lump all of that under the head of recreation? A. That's right.

Q. Do you know whether you are talking about the recreation department of the City of Macon or just recreation supervision generally? A. I know one thing, I know I didn't do it, I just [300] took it for granted they did it.

Q. In other words, you are not familiar with anything in the recreation department? A. That's right.

Q. Anything that they did? A. That's right.

Q. You just know you didn't do it? A. That's right. I was too busy tending to my own business. I couldn't tend to theirs.

Mr. Jones: I think that's all that I have.

Examination by Mr. Shi:

Q. Mr. James, during this time when you said something about exercising control and supervision over the park? A. Yes.

Q. Did you take a good many of your instructions from somebody other than the City? A. No.

Q. You didn't have any instructions from members of the Board of Managers? A. Oh, yes, sure, sure, I thought you meant somebody in the office, yes, sure, they controlled the park.

Q. Who dictated where the shrubbery was to be planted? A. Well, I did when they built the park and then I got to fixing up around the front of the club and behind [301] there, Mrs. Dunwoody did.

Q. Mrs. Dunwoody? A. That's right.

Q. Was she a member of the Board of Managers? A. Oh, yes, and she always bought a lot of bulbs and I put them out over there.

Q. Now, you were talking about the purchase of shrubbery, and you said the Board of Managers purchased the

fertilizer? A. That's right, and shrubbery too, a lot of it and trees.

Q. And they purchased some of the shrubbery and a lot of the trees? A. Yes, sir, they sure did.

Q. And they dictated where they wanted it put? A. Where they wanted to put it, that's right.

Q. Now, during a portion of this time while you were planting this shrubbery and maintaining the park were you working for the Board of Managers as well as for the City of Macon? A. Well, the City of Macon was paying me, but they had jurisdiction of the park.

Q. Did you receive any pay from anybody other than the City of Macon? A. Yes, sir, they paid me, not a regular salary, but [302] they give me money at different times.

Q. The Board of Managers gave you money for particular work that you did? A. Just general work, nothing in particular, everything I did over there. They didn't give me a regular salary now.

Q. And on or about the early part of February of 1964, were you instructed by the City of Macon to terminate all work on Baconsfield? A. Exactly what date I don't know, but I was up at the City Hall one day and the Mayor, Mr. Merritt said, "We will have to stop work over there at Baconsfield Park," and I said, "All right, that ends it."

Q. And did you get all of your equipment out from over there? A. I didn't have much over there to get out, I was ready to move in five minutes.

Q. You were ready to terminate your connection in five minutes? A. It didn't take me but five minutes to get away.

Q. And as far as you know, have any of your employees rendered any services in connection with Baconsfield Park since that date? A. Not a one, not under me.

Q. And you no longer have any connection with the Board [303] of Managers? A. Not a bit.

Q. Did the Board of Managers approach you about working independently for Baconsfield Park? A. Yes sir, as well as I remember, Mr. Charlie Newton did, wanted to know if I could work over there and kind of supervise it after my work hours. I told him I would have to find out.

Q. Did you find out? A. I sure did, and the Mayor told me I couldn't do it, and I said, "All right." I said, "Can I do it?" and he said, "No." and I said "All right."

Q. In fact, did the mayor tell you you could either work for the Board of Managers or the City of Macon? A. That is what he meant, he didn't say that.

Q. Now, some of this control and supervision that you talk about exercising? A. Yes.

Q. Was at the direction of Mrs. Dunwoody and other members of the Board of Managers? A. Oh, yes, we discussed it together, you know, and decide on this, that or the other, and that is the way we got through. They did a lot of buying, they bought a lot of stuff.

Q. Now, Mr. Merrit hasn't ever been out there and [304] told you where to plant a camellia, has he? A. Never told me to plant anything.

Q. How about Mr. Sydney Pyles? A. No, no.

Q. Or any other member of the Park Committee of the City of Macon? A. No, not a thing.

Q. Did they ever check on how many hours your men were putting out there? A. No, never questioned me a bit.

Q. In no way? A. No way.

Q. Directed you in your work out there? A. No, sure didn't.

Q. If you needed a decision, you went to the Board of Managers? A. Yes.

Mr. Shi: I believe that's all.

Re-Examination by Mr. Jones:

Q. I do have one more question. You spoke of \$80,000 appropriation for the current year, I believe that is for parks, highways, cemeteries? A. No, cemeteries is separate, it means the highway, I am keeping up Second Street and out here by the monument, [305] I mean the Indian Mounds, and now I am figuring on getting the 16 Highway up there.

Q. At one time you referred to 75 parks in the City? A. That includes all the little small parks, Mulberry and so on and so forth, you know, and Poplar, taking it all in whole, it would average about maybe about 30 real parks.

Q. About 30 real parks? A. That's right.

Q. And in prior years your appropriation for parks was distributed someway between all of the parks? A. That's right, there was nothing itemized for any particular park wasn't, just like my cemeteries, I have got four cemeteries, each one is not itemized. It has got a lump sum to carry them all on. Now, this money includes keeping up highways and also 40 playgrounds, I have got to do that out of \$80,000 too.

Q. Anything else included in the \$80,000? A. I think that's about it, and that means equipment too now, fertilizer and shrubbery and labor and everything.

Q. All salaries of that department? A. That's right.

Q. Does that include your salary? A. That's right.

[306] Q. And all of your labor? A. That's right, and equipment, tractors and gasoline and everything.

Q. Have you any idea how many days out of the year you would do anything at Baconsfield Park or would it be 3 or 4 or 500, I mean 3 or 4 or several hundred or have you any idea how many days out of the year? A. No, as I said, sometime I wouldn't work any over there and sometimes one and sometimes five and sometimes 6 and 7, and when they got through, off they went somewhere else.

Mr. Jones: That's all.

Re-Examination by Mr. Alexander:

Q. Do you recall how many employees you had in 1964?
A. No.

Q. What was the budget of your department in 1964? A. I couldn't remember, I don't remember now. I don't keep it from year to year.

Q. I see, would you say you treated Baconsfield Park about the same as all other parks? A. Yes, included in my appropriation, they didn't get any extra appropriation for Baconsfield at all.

Q. Just considered the same as any other park? Is that correct? [307] A. That's right.

Q. Will you describe for us very briefly what you meant when you said Baconsfield Park was a wilderness when you first went out there? A. Well, there wasn't nothing there but just undergrowth everywhere, one road through there and that's all, one paved road.

Q. And no facilities out there; is that correct? A. No.

Q. And how long did it take you to turn it into a usable park? A. Oh, about 6 or 8 months, probably a year.

Q. I see, and you used employees fairly regularly during all of that year? A. Yes.

Q. Every day? A. Well, we had the PWA labor, trying to get me to give them something to do, you know, and I worked them over there.

Q. You say you used the PWA employees for maybe a year? A. I expect I did, yes, that is what I did my work with.

Mr. Alexander: That's all.

[308] MR. FRANK WILLINGHAM, Witness called by the Intervenors being first duly sworn, testified on

Examination by Mr. Alexander:

Q. Will you state your full name, please? A. Frank Willingham.

Q. Where do you live, Mr. Willingham? A. 1139 Oakcliff Road.

Q. Is that in Macon? A. Macon, Georgia.

Q. What is your occupation or profession, sir? A. I am in the textile business.

Q. What do you do in the textile business? A. Well, I run a cotton mill, try to.

Q. And what is the name of the company, sir? A. Willingham Cotton Mill.

Q. Are you connected in any way with Baconsfield Park? A. Yes, I am.

Q. How are you connected? A. I am chairman of the Board of Managers.

Q. I see, and how long have you been chairman of the Board of Managers? A. Since 1964, I believe.

[309] Q. Were you a member of the Board prior to the time that you became chairman? A. Yes, been on the board in 1954 I believe.

Q. Has your service on the Board of Managers been continuous? A. Yes.

Q. Who appointed you to the Board of Managers? A. Well, I suppose the members themselves, I was just asked to serve on the board, and I don't know whether I was appointed or not. I guess the Board so far as I know just asked me to serve and I agreed.

Q. I see, did the person who was then chairman ask you to serve? A. Yes.

Q. Who was the chairman at that time? A. Mr. Newton.

Q. Do you recall the last year in which Mr. Newton served on the Board of Managers? A. No, I would be guessing.

Q. He is not on the Board at the present time? A. It would be '64, I guess, or '63, because, see, I became chairman in '64, and Mr. Newton I think retired shortly after that, so I would say about '64.

Q. I see, what is the present valuation of Baconsfield Park? [310] A. I have no idea.

Q. Has an appraisal ever been made of the park? A. Not that I know of.

Q. Can you give us an estimate of the size of Baconsfield Park? A. I would say about 30 or 40 acres, about the size of the part of the park that we are talking about, not the commercial area.

Q. I see, and what is the approximate size of the commercial part of the park? A. I would say it must be about 8 or 10 acres in there.

Q. Will you say that part of Baconsfield Park might be described as undeveloped? A. Would I say that what, that part of it is undeveloped?

Q. Yes, let me rephrase the question, would you say that a substantial part of Baconsfield Park, you have nothing except trees and bushes? A. I would say a good deal of it is in that state now. There are certain parts between the Highway and the river that certainly are not developed in any way, but I would say most of it is just trees and shrubbery.

Q. Which highway are you referring to now? A. I am talking to 1-16.

[311] Q. And the river is the Ocmulgee River? A. That's correct.

Q. And when you say there were 30 or 40 acres, you did not include this so-called undeveloped land? A. Yes, I would say all of it that we have any control over.

Q. I see. Now, does the Board of Managers have the general control and supervision of Baconsfield Park? A. Yes, we do.

Q. And has it had such control during the entire time that you have served? A. Yes, it has.

Q. Has the Board used at any time any company or organization as agent, servant or employee? A. Now, I don't quite understand you. We have used people in the upkeep of the park since about 1964.

Q. In addition to that have you at any time used the services of an organization or a group or a company as agent for the Board of Managers? A. Not that I know of.

Q. You haven't used any groups for the purpose of managing this property? A. Oh, no.

Q. Or carrying out any business transactions? A. No. [312] Q. Is that correct? A. No.

Q. Can you state how many buildings are on Baconsfield Park at the present time? A. When you speak of buildings, are you talking about sizeable buildings or small things? We have one large building which we have already discussed, the Woman's Club, but outside of that there are some very small houses there, they are sheds really.

Q. Which year was the Woman's Club built? A. That I don't know.

Q. It was in existence at the time you became a member of the board; is that correct? A. That's right.

Q. Now, do you have in your possession, as chairman, do you have in your possession the records of the minutes of the board? A. Yes, we have that.

Q. Now, do the minutes reflect the year in which this clubhouse was constructed? A. No, I don't think, we have gone through those minutes back as far as they were kept. Part of them were lost, I understand, and we don't have any record with reference to the Woman's Club in the minutes as we now have [313] them.

Q. Who occupies the Woman's clubhouse at the present time? A. No one occupies it.

Q. Is it under the control or use of any particular group? A. It is under the Women's Club.

Q. Is that the official name of the club, the Women's Club? A. Yes, Woman's Club is all I know.

Q. Is the Woman's Club a corporation? A. And that I don't know.

Q. It is a local club here in the City of Macon? A. Well, I think there are several clubs really, but it all goes under the name of Woman's Club. That's the way I understand it.

Q. As chairman of the Board of Managers, what authority did you exercise in allowing the various groups to use the Woman's club house? A. We didn't have any authority as far as I could tell whatsoever. They controlled it themselves.

Q. Who is they, sir? A. The Women's Club, they are the ones that control that, and as far as I know, we didn't have any control at all over the Woman's Club.

[314] Q. How did the Woman's Club come to have use of the club house? A. That was before my time, I really don't know.

Q. Have you from time to time dealt with the various members of the Woman's Club in your capacity as chairman of the Board of Managers? A. Not too much, a time or two they would consult with us with reference to some painting, and we would help them occasionally with the painting, but outside of that, as far as I know, that was it.

Q. Who would consult with you? A. Some of the—well, I am talking about actually, I was not chairman at the time that they consulted us with reference to the painting, Mr. Newton was chairman at that time, and they consulted with him about painting it and so I don't really know the person who talked with him.

Q. Since you have been chairman who have you dealt with there at the Woman's club house? A. I haven't dealt with anyone at the Woman's Club.

Q. Can you tell us the name of the person who is in authority there at the Woman's Club? A. I sure couldn't.

Q. What did the Board of Managers authorize relative to painting the club house? A. Well, as I remember it, we painted it a time or two, [315] it is in our minutes there, I don't know what the amounts were, but it must have been about, oh, 2 or \$300, something like that.

Q. Did the Board of Managers authorize the appropriation of funds; is that right? A. That's right.

Q. Was there ever any discussion at the board meetings relative to the Woman's Club? A. None that—there was some discussion with reference to it but not too much. Didn't any of us seem to understand how it came to be or just what the situation was really.

Q. Is there any kind of written or oral agreement? A. Not that I know of, it wasn't during the time that I was on the Board.

Q. Now, did the Board of Managers appropriate funds for the maintenance of Baconsfield Park, sir? A. Yes.

Q. Do you have this afternoon the budget books and record books that reflect the expenditures of the Board of Managers of the park? A. Yes, we have our records there.

Q. I wonder if we could have 2 or 3 minutes to look at those? (Off the Record.)

Mr. Willingham, did the Board of Managers authorize [316] the construction of the tennis courts, baseball diamond, basketball courts on Baconsfield Park? A. Did they authorize it?

Q. Yes. A. I suppose they did, the tennis courts were there when I went on the board, so really I couldn't say definitely that those tennis courts were authorized by the

board or not, but I am sure they are because the board had authority over the whole park.

Q. Were any of those built during your service on the board? A. The only thing that was built while I was on the board is the Little League Ball Park which they built themselves.

Mr. Jones: Who is they?

The Witness: The Little League, I think that particular one is Ocmulgee Little League, put up the money and built that themselves. Of course, we authorize that they do it and also we helped the Little League for several years there by contributing money to them. I think we did that up until about 1964 when we discontinued that. Other things that were put there were the basketball courts were added on, I think while I was on the Board and this was not, this was done through our authorization but it was done by the Alexander Fund. I don't know their actual name [317] of the organization, but they put up the funds for that to put that basketball court there.

Q. Is that a private fund? A. That's a private fund, I am pretty sure it was.

Q. What did you terminate in 1964, did you terminate the Little League? A. No, the Little League still operates there but we quit donating to the Little League about 1964. It might have been a year—well, that's just about the time.

Q. Why did you terminate making the contribution? A. Well, we were having to keep the park up and our funds were very limited and so we just had to stop it.

Q. You did not have to keep the park up prior to 1964? A. Well, we had to keep it up to a certain extent. In fact, we were in charge of it, sure, but as far as—and we put

out a lot of our funds on keeping it up the whole time, but we had to spend more money after '64 to keep it up because it just took more then.

Q. It took more after '64 than it did before 1964? A. That's right.

Q. And what do you attribute the increase of cost to? A. Well, we hired a private organization to come in there, the Cumbie Brothers and keep the park up, and that was the main reason I would say that it took quite a bit to [318] keep it up.

Q. Will you spell that sir, Cumbie Brothers. A. Cum-bie, C-u-m-b-i-e (spelling).

Q. What kind of company was that? A. They are a construction company and they also did some tree work and cut grass and things like that.

Q. I see, and are they now in your employ? A. No, they are not in our employ now.

Q. Well, how many years did they work for the Board? A. It must have been a year, maybe a little over, maybe it was two years.

Q. And those were the years, what, 1964 and '65? A. I would be guessing, but I couldn't say definitely which two years, I would say, it is in the records there when we started paying them.

Q. Would it be accurate to say that this company served as general maintenance supervisor for the park, they did general maintenance work for the park? A. No, I wouldn't say that for this reason, we have tried to keep it up by hiring just one person over there to cut and we couldn't afford the services of Cumbie Brothers and we discontinued that after a little over a year and as I say, it might have been two years and we decided that we would just get one person and try to keep it up that way.

[319] Q. Let me ask this: How would you describe the

general services which Cumbie Brothers performed? A. Simply cutting the grass and picking up the trash.

Q. I see. Do you have, sir, with you the amount of—do you have records which would reflect the amount of money that the Board spent in 1966 for maintenance of the park? A. They would be the records, it would be in the records which you have there, the financial records, yes.

Q. I wonder if you could look at the records and show us that figure? A. I don't know whether I could actually give you a total.

Mr. Grant: Didn't we furnish that in answer to one of these interrogatories?

The Witness: I don't think there is a breakdown on that thing. Do you have the records?

(Off the record.)

Mr. Grant: In answer to interrogatory No. 9 originally it was set out for 1960 through 1966 the expenditures broken down to flowers and fertilizer, insurance, agency commission and so forth.

By Mr. Alexander:

Q. Let me ask this: Did the Cumbie Brothers perform the services which theretofore had been performed by Mr. James? [320] A. I would say yes, yes, that's correct.

Q. All right. A. Up to a certain extent. I don't think that—actually, I would think it would cost Cumbie Brothers more to perform these jobs than it would Mr. James.

Q. How many employees do you have now working? A. One.

Q. At the park? A. One.

Q. What is the name of that person? A. I can't think of his name. That is why I was looking puzzled. We have got it in the records here in the minutes.

Q. Would that be Rochelle Johnson? A. That's right, Rossell Johnson.

Q. Rossell Johnson? A. That's right.

Q. How long has he been working for the Board? A. I would say for the last three years probably.

Q. He is a full time employee; is that correct? A. No, he is not in full time, I mean he works at the park, I would say, maybe three days a week and I will qualify that, sometimes he might work more than that a week, but then on occasions he will work a couple of days or three days a week on that.

[321] Q. What type of duties does he perform? A. Cuts grass, I was trying to think, he has trimmed the roses some and put some straw around in there and maybe trimmed some of the shrubbery, that's all that I know that he has done, of the duties that he has performed.

Q. I see, what is his salary, sir? A. It is in the record there?

Mrs. Kearnes: Presently it is \$1.45 an hour.

By Mr. Alexander:

Q. You don't know the exact amount? A. No, I don't, the arrangement for that was made by one of the other Board members, and I just can't remember right off hand exactly what it was.

Q. Do you have general supervision over the employees of the Board? A. Well, I wouldn't say that I had direct supervision over them, one of the other members of the Board would actually be the one that supervises it.

Q. Can you give us the name of that member? A. Mrs. Frances Hall.

Q. Where does she live, sir? A. I don't know the name of her street.

Mr. Sparks: Peyton Place.

The Witness: Peyton Place.

Q. Is that in the City of Macon? A. Yes, that's right.

[322] Q. Mr. Willingham, are you familiar with the term Baconsfield Park Commission? A. Yes.

Q. Would you explain to us what that term means? A. Well, it is a Board that was formed for the purpose of running the park. It had direct supervision over the park in every way, and as far as I know that's all they had to do was to supervise the park and ran it in every way. They controlled the funds. Are you talking about the committee that I am chairman of?

Mr. Jones: He asked you if you were familiar with the term "Baconsfield Park Commission." I had never heard it myself.

The Witness: No, I thought he was talking about the committee that I served on.

Mr. Jones: No.

The Witness: I am not familiar with any commission.

Q. As I understand it, you .. chairman of the Board of Managers? A. That's right ..

Q. I asked you whether or not you were familiar with the term Baconsfield Park Commission? A. No.

Q. You are not familiar with that? [323] A. No, I am not familiar with that.

Q. Are you familiar with the action of the State Highway Department in obtaining certain land for the construction of a highway through Baconsfield Park? A. To some extent, yes, actually most of that was handled by Mr. Newton.

Q. I see, and you were serving on the Board at the time?
A. That's right.

Q. Will you state whether or not the Highway Department obtained that land by condemnation? A. Well, no, I think it was through agreement. We had an appraiser to come in, Mr. Jack Hall, and I understand that it was worked out between this appraiser and the Highway Department and Mr. Newton.

Q. How much did the Board of Managers receive from the Highway Department for that land? A. It is in the record there, I don't know the exact amount. It must be about \$129,000.

Q. Does the Board of Managers have stocks and bonds at the present time? A. They have this fund that you just spoke of, the highway fund invested in bonds and outside of that, that's all that I know of.

Q. Would you say that fund is between one and \$200,000? [324] A. Yes, \$129,000 is what we received or just about that from the Highway Department.

Q. In addition to that, do you have other cash in the bank in some other depository? A. We have only the regular funds that we receive from commercial property during the year that we use to operate and maintain the park and that's in the records also which we are furnishing you.

Q. Would it be accurate to say that as of today the Board of Managers has approximately \$10,000 in cash for day to day operation of the park? A. I haven't had a report on that too recently about the exact amount that we have in the bank. It is in the record there and you can look at it and see what it is, but I don't know the actual figure that we have in the bank today because there are certain rentals that come in from time to time and of course that would change it.

Q. Would the figure of \$10,000 be approximately correct?

Mr. Jones: Counsel, may I ask a question.

Mr. Alexander: Yes.

Mr. Jones: If you are trying to test his memory, of course, that is one thing; but if you are seeking information, wouldn't your records be the best evidence of it?

[325] Mr. Alexander: Well, I don't think we have any records which would reflect that.

Mr. Jones: All of these records here reflect it.

Mr. Alexander: What I was about to say, sir, I don't think we have the records which—

Mr. Jones: Excuse me, I thought I might suggest to you, that if you had those figures in black and white that that might serve your purpose better.

Mr. Alexander: What I am not certain of is that we have here any records which give us an approximation as of today, I believe the answer to the interrogatories that we submitted were as of January 1, and I am now asking what they have as of April as distinguished from January.

The Witness: We can certainly furnish that to you as to what it is. What it actually is, I don't know. I will just be truthful.

Q. Let me just rephrase the question. The interrogatories, the answers to the interrogatories stated that as of January 1, you had \$9,205. Has there been any substantial depletion of that to the best of your knowledge? A. There would be some depletion—

Mr. Anderson: Could we go off the record and [326] let us give him the figure.

Mr. Jones: If he is willing for you to.

Mr. Alexander: Yes.

Mr. Anderson: The figure on April 17, the cutoff date of this statement shows \$9,443.67 cash on hand.

(Off the record.)

By Mr. Alexander:

Q. I wasn't trying to pin you down to the exact penny, but I just wanted to know if \$9,000 was approximately the amount? A. Approximately, yes.

Q. What is the monthly income that the Board of Managers receive from the lease of the commercial property which is directly across from Baconsfield Park? A. The monthly income?

Q. Yes. A. We get somewhere—I can give you the yearly better than I can give you the monthly.

Q. That would be satisfactory. A. We get somewhere around 5 or \$6,000 a year from that property over there.

Q. Can you give us the name of the lessee? A. The people that we receive it from?

Q. Yes, sir. [327] A. Actually we have it in the leases here, and I couldn't name exactly the ones that lease the property. At one time Mr. Nash controlled most of that property over there and since that time he died and some of it was left in his wife's name and outside of that I wouldn't be able to tell you just who they were. It is in the record there and you have the leases so you would know from that just exactly who they were.

Q. Would it be accurate to say there are 6 or 7 different lessees; is that correct? A. No, I wouldn't think so, I would think there would be 1 or 2.

Q. Would you tell us the exact number of lessees involved? A. We have four leases.

Q. And the Board of Managers receives the income of approximately \$5,000 per year? A. Yes.

Q. From those four lessees; is that correct? A. That's right.

Q. Do you receive any income from any of these sub-leases? A. No, no.

Q. Do you receive a yearly income from the City of Macon for the lease of any property? [328] A. Wait a minute, yes, we do, the Happy Hour Club, which we receive, I think it was \$300 a year, and that's all that I know of that we receive anything from the City.

Q. You may have answered this once before, I don't recall, do you receive any money from the Woman's Club? A. No, no money.

Q. Who on the Board of Managers has the day to day charge of supervision of the Woman's Club? A. No one.

Q. Does the Board of Managers consider itself as having responsibility for the supervision of the Woman's Club on Baconsfield Property? A. No.

Q. Has the Woman's Club been conveyed by the Board of Managers to any other group or any person? A. Not that I know of.

Q. So far as you know it is still owned by the trustees or the Board of Managers of Baconsfield? A. I don't know who owns the club, I just—I was not on there when it was built and I do not know any of the terms of the agreement of when it was built, so I don't know who owns it, I just don't know.

Q. Do you think Mr. Newton might know? A. I don't believe Mr. Newton is in any condition to know right now for health reasons.

[329] Mr. Jones: Mr. Newton is wholly incapacitated so far as providing his testimony is concerned. He can't speak.

By Mr. Alexander:

Q. Let me ask this: Who pays for the electricity that is used in the Woman's Clubhouse? A. The Woman's Club.

Q. Who pays— A. I will say this, I don't know who pays it, we do not pay for it, I know that.

Q. Who pays for the water that is used in the Woman's Clubhouse? A. There again I will say the same thing, we do not.

Q. Has the Woman's Club obtained permission from the Board of Managers to do repair work on the clubhouse? A. No.

Q. Would it be accurate to say then that the Board of Managers has supervision and control of Baconsfield Park and yet you have a structure on the park called the Woman's Clubhouse and you as chairman of the Commission have no knowledge as to the name of the person in charge of the clubhouse, who operates the clubhouse, when it was built, who maintains it or any other information relative to it; is that right? A. That's correct.

Q. And also that there is nothing in your records [330] which in any way reflects that? A. That's correct.

Q. Let me ask you this: Would you consider the occupants of the clubhouse as squatters? A. I don't know whether I would consider them as squatters or not. I think they have the right to be there or they wouldn't be there, but I still don't know whether they legally have the right to be there because I have never seen any agreement with reference to the Woman's Club.

Q. Have you at any time, I believe you answered this question once before, but when did you first become a member of the Board of Managers? A. 1954.

Q. And you have served continuously since then? A. That's right.

Have you at any time from 1954 until the present time in 1967 ever seen any member of the Negro race in the Woman's Clubhouse? A. Yes, I have.

Q. In what capacity were they in the clubhouse? A. I would say as cook or maid or something like that.

Q. You have never at any time seen any member of the Negro Race there as a guest or as a member of the club, have you? [331] A. No, I haven't, but I do not know that it hasn't taken place. Of course, I am not at all of the meetings that they have.

Q. Have you from time to time made visits to the clubhouse at the time they had meetings going on? A. No.

Q. Where does your board of managers hold its meetings? A. We hold our meetings at the First National Bank Building in the Director's Room.

Q. Have you met there during the time, during the entire time that you have been on the Board? A. Have I met what?

Q. Have you held your meetings there at the Bank during the entire time that you have been on the Board of Managers? A. Yes, yes.

Q. Have you at any time ever held your meetings there at the Woman's Clubhouse? A. Not since I have been on the board.

Q. I see, has the school system ever requested permission from the Board of Managers to use the playground on Baconsfield Park? A. That I don't know, so far as I know while I was on the Board, I don't know that they have asked permission [332] to use it. If it happened, it happened prior to the time that I was on the Board.

Q. As of today; that is, during the year, 1967, the school system is continuing to use the playground on Baconsfield Park? A. Yes.

Q. Would you say the general neighborhood in which the park is located is a white neighborhood? A. Yes.

Q. Would you say that the Alexander School which is located in the vicinity is either totally white or predominantly white school? A. Predominantly, yes.

Q. Does the school, the Alexander School in the vicinity of the park have any other playground or is the one on Baconsfield the only playground? A. That's the only one, yes, that's the only one I know of.

Q. Mr. Willingham, would it be accurate to say that beginning in 1964 the expenditures by the Board of Managers for the operation and maintenance of Baconsfield Park increased substantially over previous years? A. Yes, I would say so.

Q. And would you attribute that to the fact that the City of Macon withdrew as trustee? [333] A. Would I—say that again now.

Q. Would you attribute the substantial increase in expenditures to the fact that in 1964 the City of Macon withdrew as trustee? A. Yes, I would say it was.

Mr. Alexander: I think that's all, sir.

Examination by Mr. Jones:

Q. The last subject that he referred to, it has been testified both by Mr. James and the Mayor that to some extent the facilities of the park department of the City were made available to the Board of Managers in connection with the operation and that terminated in 1964? A. Yes, sir.

Q. After that time, did you have any benefit of any sort of character from any such activities by the City? A. No sir.

Q. Whatever costs may have involved to the City for the services which were rendered through its park department, did the Board of Managers always have addi-

tional expense in connection with the operation of the park? A. State that again, I didn't quite get it.

Q. I said irrespective of the value or amount of the participation by the park department of the City in [334] connection with cutting grass and whatever they did there, did the Board of Managers from its own funds also have substantial expenses in connection with the operation? A. Yes sir, it did.

Q. Since 1964—well, one more question, I think I had started to frame this question and didn't complete it, whatever it may have cost the City or the taxpayer to give you the assistance which you did receive, when it became necessary for you to provide that from private sources, would that have been more costly to you than it would to the City? A. Yes sir, that's right.

Q. Mr. Willingham, reference has been made to an appraisal, reference was made to how the State Highway Department acquired the right of way to 1-16 and you stated that you believed that it was by negotiation by Mr. Newton. Do you know as a matter of fact that there was a condemnation suit filed by the State Highway Department? A. Yes sir, I believe it was.

Q. Had there been any prior negotiation with reference to that by Mr. Newton with the Highway Department as to value? A. Yes sir, they had discussed it.

Q. You stated that an appraiser was obtained, was that obtained by the Board of Managers or by the City? [335] A. Actually I think the Board of Managers hired Mr. Hall to make that appraisal of that property. Now, whether the City did or not, I don't know or the highway department.

Q. Would your records disclose the payments for that cost? A. Yes.

Q. You have no information as to what the City may have done or said so far as the Board is concerned? A. No sir.

Q. The cost to them would be reflected in the records of the Board? A. Yes sir, it would.

Q. If I understand the situation with reference to the Woman's Club, the arrangement for its use and the arrangements for its construction all preceded your membership on the Board? A. Yes sir.

Q. And you do not know the details of those arrangements? A. No sir.

Q. Is it or not true, however, that since you have been on the Board the entire management and control of the clubhouse used by the Woman's Club has been under the Woman's Club and not under the Board of Managers? [336] A. Yes sir, that's right.

Q. With reference to the lease rental income, is that a net figure; that is, do the lessors pay for taxes and repairs and insurance? A. Yes sir.

Q. And whatever other obligations would normally reduce the gross rental to a net rental? A. Yes sir, that's right.

Q. So that the amount you receive is net of all of those matters? A. Yes sir.

Mr. Sparks: Excuse me, did you mean to say the lessees paid that?

Mr. Jones: Lessors, no, the lessees paid it. Didn't I say that?

Mr. Sparks: No, you said lessors, and I thought you meant to say lessees.

By Mr. Jones:

Q. I am sorry, I am talking about tenants? A. Yes, sir.

Q. The tenants are the ones who pay all of those? A. Yes sir.

Q. Cost and expenses? A. Yes sir.

Mr. Jones: I believe that's all I have.

[337] *Examination by Mr. Grant:*

Q. As a matter of fact, then tenants are responsible for the construction of improvements on this rented property aren't they? A. Yes sir.

Q. In other words, the Board just leased the vacant land to Charlie Nash? A. As a land lease.

Q. And he through sub-tenants have arranged for the construction of the drugstore and other buildings on the property which was vacant at the time the Board leased it? A. Yes sir, I don't know whether it is proper now or not, but some of the testimony I heard from the Mayor with reference to the dirt or fill that was hauled into the park was paid for by the Board of Managers, we paid some \$3500, I think, for that dirt that was hauled in and it is in the records and you will see it when you read it.

Q. Was that when Mayor Merritt was talking about 100 or 200 loads? A. Yes sir.

Q. In the sink between the clubhouse and North Avenue? A. That's right.

Q. And the records of the Board show that the Board [338] paid the City of Macon \$3500 for hauling that dirt in there? A. Yes sir.

Q. Do the records also show payment by the Board for curbing and guttering? A. Yes sir, that's right.

Mr. Jones: You might read those records into the record with reference to that \$3500.

The Witness: With reference to the dirt that we paid the City for, the Board of Managers paid the City \$3500 for the fill dirt which he testified to this morning between April 1, '56 and March 31, '57. Of course, it was hauled in there at different times, but we did pay that amount to them for that fill dirt that was hauled in there.

Re-examination by Mr. Alexander:

Q. You can't say, can you, Mr. Willingham, that the City never spent any money at all for the operation and maintenance of Baconsfield Park? A. No sir, no sir.

Q. Also you can't state from your personal knowledge that the Board of Managers paid the fair market value for the dirt, can you? A. It was a lot of money, I don't know whether it was [339] fair value or not. I would think so for fill dirt.

Q. But for 100 or so dump truck loads of dirt, you have no personal knowledge as to what such would cost?

Mr. Jones: In 1956!

By Mr. Alexander:

Q. At the time it was placed in the park? A. No sir.

Q. The only thing you know is what the Board of Managers paid out? A. That's right.

Q. Can you state for us a few of the companies or businesses that are on the so-called commercial property? A. Oh, there is ChiChester's Pharmacy, better known as Baconsfield Pharmacy and then there is a Dairy Queen, Pure Oil Company used to be there, and they are no longer there. Seven-Eleven which is a sort of a grocery store, I reckon you would say and then I think there is a variety store over there and a shoe store, and I think

there is a Shell filling station over there, and I think there is one that used to be a laundry, pick-up place there. That is all I know about. Yes, there is a doctor's office over there too, Dr. Birdsong.

Q. Will you state the bank in which the Board of Managers keeps its deposits? A. First National Bank and Trust Company.

[340] Q. And has the Board of Managers at all times used that bank as depository for its funds? A. The whole time I was on the Board, yes.

Q. I think you indicated you wanted to describe what the relationship of the bank was.

Mr. Jones: I made the statement that Mr. Willingham can correct that he has stated, Mr. Willingham had testified that there was no agency contract with any organization or company. He was referring to operation and management of—the Board of Managers does have a fiscal agency agreement with the First National Bank under which the First National keeps its financial records and receives the funds that come to them and disburse those funds, and that is done by the First National under an agency agreement with the Board of Managers.

By Mr. Alexander:

Q. Is what counsel stated correct? A. That's right.

Q. Has the Board at any time made deposits of funds with the City of Macon? A. No sir.

Q. What was the arrangement regarding the handling of fiscal matters prior to 1964? A. It was the same as it is now.

Q. Did the First National Bank serve as depository [341] prior to 1964? A. As far as I know they served.

Q. Who handled the business affairs of the Board prior to 1964? A. The Board handled it.

Q. Any particular member of the board? A. Well, Mr. Newton was chairman, and he was trust officer of the First National Bank.

Mr. Jones: May I clarify that a little further.

Mr. Alexander: Yes.

Mr. Jones: Actually the bank has always been the depository bank of the funds and they have maintained their checking account. However, the agency arrangement did not originate until October, 1964. Prior to that time Mr. Newton was there and Mrs. Kearnes was Mr. Newton's secretary and she kept, they kept some of the bank's records and incidentally some of the others, but it was purely a checking account so far as the bank was concerned prior to that time and a function of Mr. Newton as a member of the Board or chairman of the Board to look after things and Mrs. Kearnes did a good deal of that for him, for Mr. Newton. I think that's the situation.

The Witness: That's correct, yes.

Mr. Alexander: No further questions.

[371]

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

[TITLE OMITTED]

INTERVENORS' SUPPLEMENTAL RESPONSE TO
MOTION FOR SUMMARY JUDGMENT FILED BY
SUCCESSOR TRUSTEES UNDER WILL OF
A. O. BACON—Filed June 27, 1967

Comes now, REV. E. S. EVANS, LOUIS H. WYNNE, REV. J. L. KEY, REV. BOOKER W. CHAMBERS, WILLIAM RANDALL, and REV. VAN J. MALONE, Intervenors, who file this Supplemental Response to the Motion for Summary Judgment filed by the successor trustees under the will of A. O. Bacon, and show the Court the following:

—1—

There are many additional material facts which are in dispute or which have not been fully developed in this case. The Intervenors show further that before the instant case is disposed of, a full hearing should be had to determine the facts and to fully develop certain important aspects of this case.

—2—

There are several constitutional questions involved in this case and intervenors are entitled to a full hearing on the merits, including an opportunity to introduce evidence and produce witnesses, before said constitutional questions are resolved.

—3—

The entry of a judgment to the effect that the trust properties should revert to the heirs of Senator Bacon would violate the intervenors' rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, in that:

(a) A Judicial decree of reversion would not implement the [372] intent of Senator Bacon's will, which expressed the legally incompatible intentions that (1) Negroes be excluded from Baconsfield Park, and (2) that Baconsfield Park be kept as a municipal park forever. A judicial choice between these incompatible terms must be made in conformity with the said Fourteenth Amendment. The affirmative purpose of the trust, to have a park for white people, will not fail if the park is opened for all, and for the court to rule that the mere admission of Negroes to the park is such a detriment to white persons' use of the park as to frustrate the trust and cause it to fail, would be a violation of the said Fourteenth Amendment.

(b) Substantial amounts of government funds, labor, services, goods, and materials have been contributed to the establishment, development, and maintenance of Baconsfield Park over a long period of time. The City of Macon appropriated funds and also developed the park by a landscaping project funded in part by the City of Macon and in part by the United States Government through its agency, the Works Progress Administration (W.P.A.).

Intervenors show further that the City of Macon appropriated substantial funds of at least \$100,000.00 to erect a swimming pool, playground and recreational facilities, established by the City of Macon and the Bibb County School System. The said School System continues to use Baconsfield Park as a playground for one of its schools, namely Alexander School No. 3. The said park was operated from the time of its development until the City resigned as trustee, as an integral part of the Macon parks system and maintained by City of Macon employees out of general appropriations of the city parks department.

(c) By virtue of contributions to Baconsfield Park made by the Government of the United States, the entry of a judgment to the effect that the trust properties should revert to the heirs of Senator Bacon, would violate the

intervenors' rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. [373]

—4—

That attached hereto, and incorporated herein by reference, are the following exhibits:

- (a) Exhibits "A" and "B"—two volumes of minutes of the Board of Managers of Baconsfield.
- (b) Exhibit "C"—Statement from the First National Bank and Trust Company of Macon, Georgia, Trust Department, agent for the Board of Managers, for the period of 10-14-64 to 4-17-67.
- (c) Exhibit "D"—Statement of assets of said Board held by said Trust Department as agent of the Board.
- (d) Exhibit "E"—Certified copy of records of the Works Progress Administration (W.P.A.), Project No. 244, thru 262 and 2364 relating to landscaping of Baconsfield Park.
- (e) Exhibit "F"—Certified copy of Deed from Bibb County Deed Book 248, Folio 11.
- (f) Exhibit "G"—Certified copy of Deed from Bibb County Deed Book 248, Folio 16.
- (g) Exhibit "H"—Certified copy of Deed from Bibb County Deed Book 496, Folios 157-159.

—5—

That in addition to the foregoing, the interrogatories and deposition filed in this case are incorporated herein by reference.

WHEREFORE, intervenors pray that this court:

- (a) deny movants the requested motion for a summary judgment and set this case down for trial on the merits;

(b) vacate its previous judgment permitting the City Council of Macon, Georgia to resign as trustees of Baconsfield;

(c) vacate its previous judgment appointing private trustees to administer the Bacon trust;

(d) make so much of the Georgia Supreme Court's judgment on remand as is consonant with and not inconsistent [374] with the judgment of the United States Supreme Court in the case of *Evans, et al. vs. Newton, et al.*, 86, S. Ct. 486, 15 L. ed. 2d 373, the judgment of this Court; and

(e) declare the City Council of Macon, Georgia and its successors in interest the trustee of the Baconsfield Park forever to hold, maintain and operate as a public park on a nondiscriminatory basis and otherwise in accordance with the wishes of Senator Bacon as expressed in his Last Will and Testament; or

(f) alternately, declare the City Council of Macon, Georgia and its successors in interest, the bona fide holders of Baconsfield Park in fee simple;

(g) grant them cost and attorneys fees in this action;

(h) grant such other and further relief as to this Court may seem just and proper.

This 26 day of June, 1967.

/s/ WILLIAM H. ALEXANDER
WILLIAM H. ALEXANDER
859½ Hunter Street, N. W.
Atlanta, Georgia 30314

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

Attorneys for Intervenors

(Certificate of Service Omitted in Printing)

[506]

EXHIBIT "B"

**MINUTES
BOARD OF MANAGERS
BACONSFIELD**

covering

period

From March 30, 1936

Through Oct. 31, 1945.

[507]

March 30, 1936.

The meeting of the Baconsfield Park Commission was held today in the Mayor's office with the following present: Mr. G. Glen Toole, Chairman; Mrs. Hay; Mrs. P. Williams; Mayor Herbert I. Smart; Dr. W. G. Lee.

The election at the previous meeting of Mrs. T. J. Stewart to succeed Mrs. Randolph Jaques who resigned was confirmed. Dr. W. G. Lee was elected Secretary and Treasurer for a year.

Chairman Toole and Treasurer Lee reported that they had granted use of the base-ball park in Baconsfield Park to General Motors Company to stage a "Parade of Progress" show free of charge through their agent, C. A. Lewis, in charge of the Department of Public Relations, and same was approved by the board.

The following resolution regarding Mr. John L. Anderson, former member of this board, was approved:

"WHEREAS, John L. Anderson, a former member of this Board, was duly elected secretary and served as such for several years, and—

"WHEREAS, the said secretary has moved from the City of Macon, and his membership on this Board has been declared vacant, and—

"WHEREAS, the minutes of the meetings held during the tenure of office of Mr. Anderson are in his possession, and although repeated efforts have been made to obtain the said minutes they have not been forthcoming—

"BE IT RESOLVED That the action of the [508] members of this Board up to the present are hereby approved.

"BE IT FURTHER RESOLVED That continued efforts be made to obtain the said minutes and in the meantime the new secretary keep regular minutes of the meeting."

The following is a copy of an item in the will of Senator A. O. Bacon, which furnished the basis for the following resolution:

"Should the Mayor and Council of the City of Macon at any time consent to do so, then I direct that they be authorized to receive the fund constituted of said bonds and all additions thereto and the proceeds thereof, and cover the same into the treasury of the City, in consideration of the perpetual obligation of the city to be evidenced by its bond or otherwise, to provide and pay over annually to the said Board of Managers an amount equal to five per centum interest upon the sum thus covered into the treasury, to be devoted by said Board to the uses hereinbefore specified."

Motion was made by Dr. W. G. Lee that Mayor Herbert I. Smart be requested to take up with the Council of the City of Macon and the proper department of the Federal Government the matter of paving the roadways in Baconsfield Park, with the understanding that Council will furnish

the proceeds from the sale of \$10,000,00 worth of Macon Railway and Light bonds [509] owned by the Park Commission and held by the City of Macon to be used for such paving if it can be supplemented with funds secured from the Federal Government on the customary basis of 55-45.

Chairman Toole and Treasurer Lee reported to the commission that within the last twelve months that they have planted approximately 3,000 dog wood, both white and pink, in the park, about 10,000 rhododendron and mountain laurel, about 600 camellia japonicas, and 5,000 azaleas; that the walks and bridges have been laid out through the woods and placed over the streams; and that the park is rapidly developing into a real place of pleasure and resort for the white residents of Bibb County, as set forth in the will of its donor.

DR. W. G. LEE

Dr. W. G. Lee, Secretary

O.K. W.G.L.

[512]

June 29, 1936

Meeting of the Baconsfield Park Commission was called in the Mayor's office at 10:30 o'clock in the morning of June 29, 1936, with the following members present:

Chairman G. Glen Toole
Mayor Herbert I. Smart
Mrs. P. L. Hay
Dr. W. G. Lee.

The minutes of the meeting of March 30 were read and approved, with a correction of Mrs. Frederick Williams instead of Mrs. Cheatham's name as appeared in the minutes.

The matter of paving the roads in Baconsfield Park was discussed at length, as was also the building of a swimming pool in the Park. After some discussion, motion was made by Dr. W. G. Lee that the members of the Park Commission who were present be made a Committee for the purpose of selecting and agreeing upon a site in the Park for the building of a swimming pool, and that they hold their first meeting this afternoon at 6:30 in the Park. The motion was carried. Mayor Smart, Ch.

The following bills from Crane & Company were authorized for payment, for plumbing done in the home occupied by Mrs. Hedeman:

\$11.65,
\$5.81,
\$1.39,
\$5.45.

The occupancy of the home by Mrs. Hedeman came up for discussion, and the entire commission was of the opinion

that the property should not be used for charitable purposes, and agreed as soon as possible to repossess this property, and requested that no more money be expended on it until it was restored.

[513] The matter of the house occupied by the man in charge of the boats on the river, recently moved without authority to the hillside, came up for discussion, and met with the objection of some members of the Commission. No final decision was reached in this matter, but further consideration will be given it in the immediate future.

There being no further business, the meeting adjourned.

Dr. W. G. LEE

Dr. W. G. Lee, Secretary

[514]

June 30, 1936

A meeting of the Baconsfield Park Commission was held in the Mayor's office on July 30, with the following members present:

Mrs. P. L. Hay,
Mrs. T. J. Stewart,
Chairman G. Glen Toole,
Mayor H. I. Smart,
Dr. W. G. Lee.

The minutes of the meeting held June 29 were read and approved.

Chairman G. Glen Toole reported with reference to a petition sent by him as Chairman of the Baconsfield Park Commission requesting the release of the Macon Railway & Light Company bonds to be converted into cash and used for developments in the Park in terms of the Will of Senator A. O. Bacon, that Council had acted favorably upon same.

Chairman Toole reported that he had had an opportunity of visiting the swimming pool at Athens, Georgia, and found that it was being operated at a profit. He also visited the Candler pool at Atlanta, Ga.

Motion was made by Mayor Smart that Dennis & Dennis be selected as architects provided satisfactory arrangements can be made with them. The motion was carried, and Chairman Toole appointed Mayor Smart and Dr. Lee to contract with them.

Motion was made by Mrs. P. L. Hay that a committee of three be appointed with power to act to carry on all matters pertaining to the building of the Swimming Pool in Baconsfield Park, with especial reference to the matter of arranging finances for the execution of same.

There being no further business, the meeting was [515] adjourned.

W. G. LEE

Dr. W. G. Lee, Secretary

[516] The following committee: Mrs. P. L. Hay, G. Glen Toole, Mayor Herbert I. Smart, and Dr. W. G. Lee, met at Baconsfield Park July 29, 1936, and after some deliberation agreed upon site for the proposed swimming pool.

The following day, Messrs, Toole, Smart and Lee, with architect, Mr. Dennis, visited pools at Griffin and LaGrange, Georgia, saw fine plants and gained considerable knowledge about construction. They came away convinced of the wisdom of pursuing to successful conclusion the erection of a pool here as early as possible.

W. G. LEE

Dr. W. G. Lee, Secretary

approved

7-30-36

[525]

June 28, 1938

A meeting of the Baconsfield Park Commission was held at 11:00 A. M., in the Women's Club on the Park grounds, with the following members present:

Chairman G. Glen Toole,
Mrs. Kenneth Dunwoody,
Herbert I. Smart,
W. G. Lee,

with a Committee from the Women's Club, Mrs. Booth, Chairman, appearing before said Commission.

Chairman Toole reported regarding the stone marker on the premises, in memory of Senator A. O. Bacon, that with the aid of the County stone which had been selected in Jones County could be moved, and for a nominal cost of \$25.00 the wording and lettering could be done. This was authorized, and the Committee was requested to proceed with same.

Regarding the planting of evergreen trees in the swamplands adjacent to Spring Street Bridge, Chairman Lee reported that 48 bay trees, and 156 Virginia live oak had been planted; that 144 bamboo plants had been set out, representing six different varieties, which were donated by the U. S. Government; also that 500 additional dog wood, some of them single white, double flower white, and double flower red, had been planted, making a total number of 2,000 planted in the Park over the last two years. Likewise, Petunias in large numbers had been planted on the borders leading to the approaches of the Bridge.

The Baconsfield Park Commission expressed appreciation to Secretary W. G. Lee for the donation of three large Camellias, planted in the small triangular park adjacent to Nottingham Drive.

[526]

Mr. Toole requested all of the members of the Commission who were present at today's meeting, to aid the Women's Club in every way they could, in the plans for construction of a new Club House on the grounds. The Committee approved the site which had been selected to build the new Club House on. Letters from the Mayor and Council, and from representatives of the heirs of Senator Bacon, were presented by Mrs. Booth, and will be made a part of the permanent records of the meeting.

Secretary W. G. Lee made a motion that the Mayor and Council be requested to give police powers to the park keepers now on the grounds, and that they be instructed to stop trucks and fruit wagons and such traffic from using the roads and streets in the Park proper.

A Committee composed of Mrs. Dunwoody, Messrs. Smart and Lee, was appointed by the Chairman and requested to ask Council's cooperation in getting all of the available second-hand paving material possible, and take such other necessary steps to comply with Federal Aid requirements in getting the streets in Baconsfield Park paved so that it could be used the year round with safety and convenience.

This Committee was likewise requested to ask Council to consider the wisdom of converting our \$10,000.00 of Railway & Light Bonds into money, and using the same to match Federal Aid in the building of a modern, up-to-date swimming pool in Baconsfield Park.

There being no further business, the meeting adjourned.

Dr. W. G. LEE, SECRETARY
Dr. W. G. Lee

approved except last clause concerning using bonds money for pool

[527]

October 12, 1938

A meeting of the Baconsfield Park Commission was held in the Mayor's office on October 12, 1938, with the following present:

Chairman G. Glen Toole,
Mrs. Stewart,
Mrs. Hay,
Mr. Smart,
Dr. Lee.

The minutes of the meeting held June 28, 1938 were approved, with the exception of the last clause authorizing the expenditure of our Railway & Light Bonds for the swimming pool.

Secretary & Treasurer W. G. Lee requested that the purchase of Dogwood, Magnolia, and other shrubbery be authorized, provided it was approved by the Park Commissioner, Mrs. James. The recommendation was unanimously approved.

Motion was made by Chairman Toole that a petition be made to Mayor and Council, for the sale of the Railway & Light Bonds held by the Baconsfield Park Commission, *said funds to be used to match Federal Aid*, and the total amount to be used in paving roadways within the Park, said roads to be approved by the Baconsfield Park Commissioner.

There being no further business, the meeting was adjourned.

Dr. W. G. Lee, Secretary
W. G. Lee

Approved
5-26-1939

[528]

May 26, 1939

A meeting of the Baconsfield Park Commission was called to order by Chairman Toole, at the City Hall with the following members present:

Chairman Toole,
Mrs. Williams,
Mrs. Dunwoody,
Mrs. Hay,
Mr. Smart,
Park Commissioner James,
Secretary & Treasurer W. G. Lee.

The minutes of the meeting held October 12, 1938 were read and approved.

The meeting reported after a conference with Mayor Bowden that effort was being made to include the roadways in Baconsfield Park in a paving program being projected by the City. They hope to report progress in the near future on same.

Dr. Lee reported an itemized list of all receipts and Disbursements since 1937, through May 26, 1939. Same was approved and was made a part of the minutes, and the Mayor was requested to have the books of the Treasurer audited at their convenience.

Mr. Smart discussed the wisdom of having cards furnished to the hotels, advising the traveling public of our parks, in order that they might take advantage of same. The matter was referred to Mr. Smart for his attention.

Motion was made by Mr. Toole that the Park Commission be requested to stop allowing dirt hauled out of any of the Park property by anyone for any purpose. This was duly carried.

He also moved and the motion was carried, that Messrs. Lee, Smart and James be authorized to purchase such [529] additional shrubbery as they deemed necessary to complete the planting for the lowlands of the Park above and below the Bridge.

There being no further business, the meeting was adjourned.

Dr. W. G. Lee

Dr. W. G. Lee, Secretary & Treas.

O. K.

by ——

W. G. Lee

[546]

October 27, 1942

A meeting of the Baconsfield Park Commission was called by Chairman Toole and met at the City Hall at 11:00 A. M., with the following members present:

Mrs. Kenneth Dunwody
Mrs. P. L. Hay
Mayor Chas. L. Bowden
Mr. Herbert Smart
Chairman Toole and
W. G. Lee, Secretary and Treasurer

The minutes of the meeting of March 3, 1942, were read, and a new contract signed by the Mayor of Macon and W. G. Lee, Secretary and Treasurer of the Baconsfield Park Commission, transferring title to site of roadway through the East side of the Baconsfield Park property, accompanied by check from Mayor and Council and a map, which is to be made a part of the minutes, was presented, read and approved.

Chairman Toole reported the fact that the lady living in the house with Mrs. Hedeman, who had been bedridden for some time, had expired, and recommended that the property be possessed from the present occupants and the same be improved for renting purposes. The motion was made by Herbert Smart and seconded by Mrs. Hay and was carried. Reference to the minutes of July 10, 1941, to the effect that Chairman Toole was authorized at that meeting to notify Mrs. Hedeman to vacate the property was made and said motion was passed and he was again at this meeting requested to proceed to get possession of the property.

Mr. Smart made a motion that a committee be appointed with power to act in the matter of contracting, if possible,

to rebuild the house at present occupied by Mrs. Hedeman, at a price not to exceed \$700.00. The motion was seconded by Mrs. Hay and was passed. The Mayor proceeded to appoint the following committee:

[547]

Lee, Chairman

Smart

Mrs. Hay

Mr. Cleveland James, Superintendent of the Park, was present at the meeting and after a free discussion by him and Dr. W. G. Lee regarding the need for shrubbery for planting additional areas in the Park and completing other areas in planting, a motion was made by Mrs. Dunwody and seconded by Mr. Smart that Secretary and Treasurer W. G. Lee be authorized to buy such things as were needed for planting purposes.

Mayor Chas. L. Bowden reported that the contract had been let for the paving through the East side of the Baconsfield Park Property and the entrance to the park opposite the entrance to the new paved highway to be made to conform in symmetry and appearance to each other. He also said that the survey revealed that it would be necessary to make it something like four or five feet beyond the present Northwestern boundary of Spring Street at the street for the purpose of improving the appearance and usefulness and safety of said street. The Board unanimously approved doing this and thanked Mayor Bowden for his attention to same.

The meeting then adjourned.

DR. W. G. LEE Sec. & Treas.

Dr. W. G. Lee, Secretary and Treasurer.

Approved by board

B. P. Com.

[548]

December 15, 1944.

The meeting of the Baconsfield Park Commission was called to order at the City Hall on Friday, December 15, 1944, Mr. G. Glenn Toole presiding, and all members present except Mrs. Tom Stewart. Mayor Bowden was present and stayed throughout the meeting.

The minutes of the last meeting held March 3, 1942, were read and approved.

A statement of the financial condition of the Commission was presented by the Treasurer, Dr. W. G. Lee, item by item from the above date through December 15, 1944, and was unanimously approved.

Secretary & Treasurer W. G. Lee reported to the Board the purchase of a concrete pipe costing \$735.00 to be used in closing up the last bad area of soil erosion in the Park. He also reported the purchase of a combination plow, tractor, mowing machine and spraying machine, together with the necessary equipment for complete usage, to the Board and they approved same.

Mayor Bowden presented the offer of Wofford Oil Company to lease the filling station on the corner of Spring Street and Emery Drive from the Park for ten years at \$65.00 per month, which really represented an extension of the lease previously held by the same concern. The lease is really for the land owned as the buildings on it and the improvements were made by the tenant. The board authorized the Secretary & Treasurer to sign said lease, which has been done, and it has been forwarded to Atlanta for signature and when returned, will be made a part of the minutes of this meeting.

A motion was made by Mr. Herbert Smart and seconded by Mrs. Dunwody that the Secretary be requested to address a letter to Mrs. E. E. Hedeman, advising her that she may continue [549] to use the house, in which she lives,

as she has in the past without cost until the first day of January, 1945. If she wishes to continue in it in its present condition without any expenditure on the part of the Baconsfield Park Commission, she may do so upon payment of \$25.00 per month in advance with the privilege of giving it up upon thirty days written notice at any time that she desires. Should she not wish to use the building under these conditions, she is here and now requested to vacate it by January 1, 1945."

Quite a bit of discussion was had, regarding the improved condition of the property, the amount of shrubbery growing upon it and its condition, in a most favorable manner by the members of the Board.

A motion was made by Mrs. Frederick Williams and seconded by Mrs. P. L. Hay that the Secretary, Dr. W. G. Lee, be requested to present the unanimous wish of the members of the Board to Col. A. O. B. Sparks, reciting under what conditions the City of Macon and the Baconsfield Park Commission would like to plan to build a swimming pool of big proportions upon certain parts of the property. If Col. Sparks is favorably impressed and feels disposed to secure the signature of the other heirs, granting their permission, we will immediately seek to carry out the plans. The motion was carried.

The mayor said that as soon as laborers on the stockade were in sufficient quantity to install the pipe and the necessary work which he had previously agreed to do, if we would buy the pipe, that he would carry out and complete this project.

There being no further business, the meeting adjourned.

DR. W. G. LEE
Dr. W. G. Lee, Secretary & Treasurer

[550]

BACONSFIELD PARK COMMISSION

TREASURER'S STATEMENT FROM MARCH 3, 1942
TO DECEMBER 15, 1944

INCOME RECEIPTS

Rents received from Wofford Oil Co.	2,210.00
Rents received from J. J. Bowen Fruit Stand	400.00
Check from City of Macon	1,500.00
Total receipts	4,110.00

INCOME DISBURSEMENTS

Insurance paid to W. D. Griffith & Son	19.74
Paid to Central Ga. Nurseries	782.00
Paid to Davenport Guerry	50.00
Paid to Heard Brothers	277.68
Paid Railroad express	2.71
Paid to Bibb Concrete Pipe Co.	735.00
Bookkeeping fee to Bank	170.00
Total Disbursements	2,037.13
Receipts over disbursements	2,072.87
Cash on hand March 3, 1942	808.14
Cash on Hand as of December 15, 1944	\$2,881.01

[551]

May 30th, 1945

Meeting of the Baconsfield Park Commission was called to order by Chairman G. Glenn Toole in the Mayor's Office, City Hall, at ten o'clock, with the following members present:

Chairman G. Glenn Toole,
Mrs. Tom Stewart,
Mrs. Williams,
Mrs. Dunwody,
Mr. Herbert Smart,
Sect'y and Treas. W. G. Lee,
Honorable Charles L. Bowden.

Park-Keeper Cleveland James was present by invitation. Mrs. Stanley Elkan was invited to be present and present a matter in behalf of the Girl Scouts, but did not attend. This matter will be carried over until the next meeting.

Minutes of the meeting of December 15th, 1944, together with an itemized statement from the Treasurer, W. G. Lee, were read and unanimously approved.

Mayor Bowden made a verbal report on the progress of securing Federal appropriation to match a local fund to be furnished by the Mayor and Council of Macon for the purpose of building a swimming pool in Baconsfield Park. Correspondence between the heirs of Senator Bacon, City Attorney J. Ellsworth Hall, Mayor Charles Bowden, and W. G. Lee, Secretary of Baconsfield Park Commission, was read to the Board and ordered made a part of the minutes of this meeting as follows:

"Macon, Georgia
February 10, 1945

"Colonel A. O. B. Sparks
Cfo Jones, Jones & Sparks
Macon, Georgia

[552]

Dear Gus:

At a meeting of the Baconsfield Park Commission held in the office of the Mayor, Charles L. Bowden, a resolution was passed appointing me, as secretary and treasurer of the Baconsfield Park, a committee of one to confer with you seeking your aid in getting the consent of the heirs of United States A. O. Bacon for the construction of a \$200,000 swimming pool and the necessary appurtenances to be erected in Baconsfield Park, subject to such conditions as would meet with the approval of you as representative of the heirs and the Baconsfield Park Commission.

The Mayor expressed a willingness to appropriate \$100,000 from his post war fund, provided he could get the Federal Government to match this fund with a similar amount. He is ready and willing to make the approach to the Federal authorities, but before doing so, wishes to have the consent of the heirs of former Senator Bacon.

The conditions surrounding the consent of the heirs and meeting with the approval of the Baconsfield Park Commission as nearly as I can comprehend them are about as follows:

We would like to develop this property on the slope facing the river beginning at a lone pine and running north or northwest to the first dirt road, leaving the W. G. Lee Boulevard.

It is the intention of the Park Commission to build and develop as handsome a property, even including sun decks, as the funds permit.

The Commission and the Mayor are both in agreement that the undertaking from the point of construction, as well as the control of the operation, will be permanently under control of the Baconsfield Park Commission; and that the net income [553] from its operation will be used

in further developing and maintaining the Baconsfield property.

Adequate parking facilities will be developed and the City will furnish to the Baconsfield Park Commission, police protection sufficient to see that it is handled in an orderly and becoming manner at all times. Since the personnel of the Board is continuously composed of four ladies and three men, we are confident that the control of it will always be of a very high standing.

Since there are no other such facilities within the City and since this project would be only a fraction of a mile from the court house, making it easily and economically accessible to a large population, we feel that the future of the park's ultimate development and usage will be greatly enhanced by this project. I personally think that such an arrangement would make possible a usage of the property eventually greater than even the donor comprehended when he so graciously arranged for a municipal ownership of this property.

I would appreciate it very much if, at your convenience, you would supplement the facts I have enumerated, which occur to you as being necessary, and get the written consent of the heirs for this development and send it to me. The Mayor assures me that as soon as he receives it, he will proceed at once to see if he can get the \$100,000 fund matched by the Government.

Thanking you very much for the time you have given in the previous conferences regarding this project, and assuring you of my complete confidence in what it will do for the usage, enjoyment and permanent development of the property, I remain,

Yours very truly,

Dr. W. G. Lee."

[554]

"Macon, Georgia
February 21, 1945

"Dr. W. G. Lee
First National Bank and Trust Company
Macon, Georgia

Dear Doctor:

I have not sooner replied to your letter of February 10, for the reason that I wanted to discuss with Ellsworth Hall, Jr., the provisions in the Will of the late Senator Bacon, with regard to Baconsfield and particularly with regard to my view that the construction and operation of a swimming pool under the conditions set forth in your letter would not be a violation of the terms of the bequest. I have done that and, as I understand it, Mr. Hall agrees with me that it will be entirely proper for the City to construct such a pool and for the Baconsfield Board of Managers to handle and to control and direct its operation in the manner outlined.

As I stated to you the other day when you mentioned this to me, I can see no reason why the consent of the heirs of the testator should be obtained, nor can I see why it is desirable to obtain this consent. I think that Mr. Hall agrees with me in this, and my understanding is that the Mayor, Hon. Charles L. Bowden, no longer desires to obtain such consent, and I am, therefore, not endeavoring to obtain it as requested.

I suggest that you confer with Mr. Bowden, and if I am wrong in my understanding, that you let me know.

Sincerely,

Gus."

CC: Mr. Ellsworth Hall, Jr."

[555]

"Macon, Georgia
March 2, 1945

"Dr. W. G. Lee, Secretary and Treas.
Baconsfield Park Commission
First National Bank & Trust Company
Macon, Georgia

Dear Dr. Lee:

Permit me to thank you for copy of letter from Mr. Gus Sparks in further reference about the swimming pool located in Baconsfield Park.

At the last meeting of the Park Commission I believe they appointed you as their representative to handle this project with Mr. Sparks and with the City. If I am correct in this will you please write a letter for the Park Commission addressed to the City of Macon asking them to sponsor the construction of a swimming pool in Baconsfield Park as we discussed then our Council Committee can work on the project and see if we cannot bring it to a successful conclusion.

If the Board did not give you such authority, at the next meeting I will appreciate you getting the Board to give you the authority to write such a letter so that we might have such a request from the Board to commence on the project.

With all good wishes, I am,

Sincerely yours,
Chas. L. Bowden."

[556]

"Macon, Georgia

March 6, 1945

"Mayor and Council
City of Macon
Macon, Georgia

Gentlemen:

The Baconsfield Park Commission at a recent meeting held in the City Hall, at which the Honorable Charles L. Bowden, an honorary member of the Board, was present, appointed me as a committee of one to study the opportunity for building a swimming pool for both children and adults in the park. They further requested that I confer with the Honorable Gus Sparks regarding the legality of our doing so.

Mr. Sparks, after a study of Senator Bacon's will and after a conference with city attorney, J. Ellsworth Hall, advised me that since all the net proceeds of said swimming pool would be under the control of the Baconsfield Park Commission and the expenditure of the entire net proceeds would be used in further development of the park property with an annual accounting made to the Mayor and Council of the receipts and disbursements, he sees nothing to prohibit us from proceeding accordingly.

A copy of the letter from Attorney Sparks can be seen in the Mayor's office.

As the appointed representative of the Baconsfield Park Commission, I request your Honor to take the necessary steps to make possible the much needed development for the benefit of the citizens of this City.

Yours very truly,

Dr. W. G. Lee
Secretary and Treasurer

[557]

Baconsfield Park Commission"

Mayor Bowden reported that the installation of the sewer pipe would cost approximately \$1600.00 and that if Baconsfield Park would share \$500.00 of the cost, he would let the contract immediately. Mr. Herbert Smart made a motion that the Secretary and Treasurer, W. G. Lee, issue check for \$500.00 and mail to Mayor Charles Bowden to be applied to the contract of Sam Hall & Sons for the installation of this pipe.

Motion was made by Mr. Herbert Smart and seconded by Mrs. Frederick Williams that the location just off of Lee Boulevard be adopted for the erection of the tablet in memory of former United States Senator A. O. Bacon. Secretary and Treasurer W. G. Lee recommended that such a part of \$200.00 be appropriated for expenditure of bearded iris as was needed for planting the area in the rear of the tablet mentioned above. The committee appointed by Chairman Toole was Mrs. Dunwody, Mrs. Williams, and Mrs. Stewart, aided by Park-Keeper James.

Secretary and Treasurer W. G. Lee recommended that an area beginning at Curry Drive and extending as far up Nottingham Drive as needed be set aside for the installation of playground equipment and that same be sufficient to comprehend the needs of children from the early ages on to maturity. Mayor Bowden and Park-Keeper James were requested to accumulate information about the type of playground equipment we should purchase and report to the Board at a subsequent meeting.

Chairman Toole stated that due to impairment of his health, he preferred to not continue as Chairman of the Board or as member of the Board, and tendered his resignation. The entire Board expressed regret at the necessity on his part for this action, but upon his insistence, the

motion was put and carried, accepting same. A committee composed of [558] Mrs. Williams, Mrs. Dunwoody, and Mrs. Stewart was appointed for the purpose of drafting a resolution of appreciation for his long service, and request was made that a copy be sent to Mr. Toole and to the Secretary Treasurer of the Board.

Mr. Smart made a motion, which was seconded by Mrs. Stewart, that a meeting be called within the next two weeks for the purpose of electing a member to fill the vacancy caused by Mr. Toole's resignation and to elect a Chairman of the Board.

There being no further business, the meeting adjourned.

Secretary

[559]

BACONFIELD PARK COMMISSION
TREASURER'S STATEMENT FROM DECEMBER 15, 1944
TO MAY 30, 1945

INCOME RECEIPTS

Rents received from Wofford Oil Company from December 15, 1944 to May 30, 1945—January, Feb; March; April; May rents @ \$65.00	\$ 325.00
Rents received from J. J. Bowen Fruit Stand from December 15, 1944 to May 30, 1945—November; December; January; Feb; March April; May @ \$10.00 per month	70.00
Rents received from Mrs. Hedeman, 105 North Avenue from December 15, 1944 to May 30, 1945—January; Feb; March; April; May @ \$25.00	125.00
Total Receipts	520.00
Cash on hand as of December 15, 1944	2,881.01
	\$3,401.01

INCOME DISBURSEMENTS

January 10, 1945	To Clark Memorial for marker	340.50
March 20, 1945	To Atlanta Tractor & Equipment Company	469.18
March 20, 1945	To Georgia Highway Express Co.	5.97
March 22, 1945	To W. D. Griffith & Son Insurance	6.19
	Bookkeeping fee to Bank @ \$5.00 per month, January thru May	25.00
Total Disbursements		846.84
Cash on hand as of May 30, 1945		\$2,554.17

5-30-45
Approved

[560]

Macon, Georgia
November 1, 1945

A meeting of the Baconsfield Park Commission was held in the Mayor's offices, with all members present except Mrs. Tom Stewart, who was unable to attend because of illness in her family. At the request of the Baconsfield Park Commission, Mayor Charles L. Bowden presided. Minutes of the previous meeting were read and approved.

The Treasurer's statement, covering the period from May 30, 1945, to October 31, 1945, was read and approved.

The matter of equipment for both the playground and a zoo was discussed at some length and Mayor Bowden was asked to find out how much of this equipment could be secured from the Surplus Property Board of the Federal Government.

Resolutions, which had been prepared by Mrs. Frederick Williams and her Committee, on the death of former Chairman G. Glen Toole, were read. Upon proper motion by Mrs. Herbert Smart, seconded by Mrs. Kenneth Dunwody, these resolutions were adopted and are hereto attached as a part of these minutes. The Board recommended that copies of these resolutions be sent to the members of Mr. Toole's family and to the Mayor and Council of the City of Macon.

Mayor Bowden reported that the tablet, which is to be erected in memory of former U. S. Senator A. O. Bacon, was ready and would be installed in the near future. Mrs. Dunwody reported that the bearded iris would be planted after the tablet had been placed.

Mrs. Stanley Elkan, as commissioner of the Bibb County Girl Scout Council, addressed a letter to the Board, requesting the privilege of building a Scout house in Baconsfield Park. Acting Chairman Bowden appointed a committee, [561] composed of Dr. Lee, Mr. Smart and Mrs. Williams, to confer with Mrs. Elkan and work out, if pos-

sible, the details of this project, which would be presented to the Board at some future date for their consideration.

The matter of filling existing vacancies on the Board was then discussed. Upon motion made by Mrs. Kenneth Dunwody and seconded by Mr. Herbert Smart, Mr. C. E. Newton, Jr., was elected a new member. A motion was made by Mrs. Frederick Williams and seconded by Mrs. P. L. Hay that Dr. W. G. Lee be elected Chairman of the Board. Mr. Herbert Smart made a motion, which was seconded by Mrs. Frederick Williams, that Mr. C. E. Newton, Jr., be elected Secretary and Treasurer. All of the above elections were approved, subject to the approval of the Mayor and Council of the City of Macon.

Secretary and Treasurer W. G. Lee recommended that the firm of Murphey, Taylor & Ellis be selected to handle the property on the Southeast side of Spring Street, in conjunction with and for the Baconsfield Park Commission, with the exception only of the filling station which is under five year lease to the Wofford Oil Company at the present time.

Secretary & Treasurer W. G. Lee directed a letter to the Mayor & Council of the City of Macon, advising them of the action of the Board on this date and requesting their approval of same. He also expressed appreciation to the Mayor and Council for their fine co-operation in the past and assured them of the Board's determination, with their help, to handle this property in harmony with them and to develop same in keeping with the best interests of the present and future citizens of this city.

[562]

Respectfully submitted,

DR. W. G. LEE CH.
Secretary & Treasurer

Pres. L. Bowden
Acting Chairman

[563]

HONORABLE G. GLENN TOOLE**A MEMORIAL RESOLUTION****BY****THE BOARD OF MANAGERS OF "BACONSFIELD"**

G. Glenn Toole was the Mayor of the City of Macon when the right to the possession and enjoyment of Baconsfield passed to the City and the first Board of Managers was created. It was largely through the efforts of Mr. Toole that the women and children of Macon became entitled to enjoy the benefits of this woodland and park at a date much earlier than would have been the case had the City authorities and the other interested parties waited until the time specified in the Will of the late Senator Bacon for the vesting of title and the transfer of possession from the Trustees of his estate.

Mr. Toole was elected a member of the first Board of Managers and throughout the more than twenty years of the existence of the Board was its Chairman.

While Mayor of the City of Macon, Mr. Toole inaugurated the program of beautifying the public parks of the City. He was a lover of flowers and all beautiful growing things, and the people of Macon and those who in the future will visit and enjoy the flowers, trees and shrubs in Baconsfield, will owe to Mr. Toole a debt of eternal gratitude.

We, the members of the Board of Managers, have missed his active participation and counsel during recent months when, because of illness, he was unable to attend our meetings, and now that he has gone, we shall feel even more keenly his absence. The least that we can do is to express our pleasure at having [564] been associated with him,

our deep appreciation for the things which he accomplished and our acknowledgment that his work with Baconsfield and the other public parks of the City of Macon was of the highest order.

BE IT THEREFORE RESOLVED that this little memorial be spread upon the Minutes of the Board of Managers of Baconsfield and that a copy be furnished by the Secretary of the Board to the members of his immediate family.

Respectfully submitted,

/s/ Mrs. FREDERICK W. WILLIAMS
Chairman.

/s/ MRS. KENNETH DUNWODY
/s/ MRS. THOMAS J. STEWART

[565]

BACONSFIELD PARK COMMISSION

TREASURER'S STATEMENT FROM MAY 30, 1945
TO OCTOBER 31, 1945

INCOME RECEIPTS

Rents received from Wofford Oil Company from May 30, 1945 to October 31, 1945—June, July, August, Sept. Oct., rents @ \$65.00 per month	\$ 325.00
Rents received from J. J. Bowen Fruit Stand from May 30, 1945, to October 31, 1945—June, July, August, Sept. Oct., rents @ \$10.00 per month	50.00
Rents received from Mrs. Hedeman, 105 North Ave. from May 30, 1945, to October 31, 1945—June, July, August, Sept., Oct., rents @ \$25.00 per month	125.00
Total Receipts	500.00
Cash on hand as of May 30, 1945	2,554.17
	\$3,054.17

INCOME DISBURSEMENTS

May 30, 1945	To Sam Hall & Sons	\$500.00
August 2, 1945	To Idle Hour Nurseries Flowers for Toole Funeral	5.00
October 9, 1945	Premium on Insurance policy on 103 North Ave.	3.66
Bookkeeping fee from May 30, 1945 through October 31, 1945 @ \$5.00 per month		25.00
Total Disbursements		533.66
Cash on hand as of October 31, 1945		\$2,520.51

O.K.

W. G. LEE

[376]

Exhibit "A"**MINUTES****BOARD OF MANAGERS OF
BACONSFIELD**

covering period February 18, 1946
through February 1, 1966

[377]

February 18, 1946.

The meeting of the Board of Managers of Baconsfield was called to order by Dr. W. G. Lee, Chairman, in the Mayor's office, City Hall, at 10:00 A. M., Monday, February 18, 1946. The following members were present:

Dr. W. G. Lee, Chairman
Herbert I. Smart
Mrs. Kenneth Dunwody
Mrs. P. L. Hay, Sr.
Mrs. T. J. Stewart
C. E. Newton, Jr., Secretary and Treasurer

Mayor Charles L. Bowden attended by invitation.

The minutes of the meeting held November 1, 1945, were read and upon proper motion, which was duly seconded, they were approved. At the meeting held November 1, 1945, Dr. W. G. Lee was elected Chairman of the Board of Managers and C. E. Newton, Jr., was elected Secretary and Treasurer. In accordance with the terms of the Will of Senator A. O. Bacon, the election of these two as members and officers was approved at a meeting of the Mayor and Council of the City of Macon held on November 6, 1945.

Dr. Lee reported that the memorial for Senator A. O. Bacon was almost completed and would be placed in the park within a short period of time.

The Treasurer's report for the period from October 31, 1945, to February 18, 1946, showing income receipts of \$365.00 and disbursements of \$392.22 and a cash balance as of that date of \$2,493.29, was read in detail and, upon proper motion, was approved and is made a part of these minutes as follows:

[378]

INCOME RECEIPTS

Rents received from Wofford Oil Company from October 31, 1945—November, December, January and February at \$65.00 per month	\$ 260.00
Rents received from J. J. Bowen Fruit Stand from October 31, 1945—November, December, January @ \$10.00 per month	30.00
Rents received from Mrs. Hedeman, 105 North Ave., from Oct. 31, 1945—November, December and January @ \$25.00 per month	75.00
Total Receipts	\$ 365.00
Cash on Hand as of October 31, 1945	2,520.51
	<hr/>
	\$2,885.51

INCOME DISBURSEMENTS

Nov. 5, 1945, To Central Georgia Nurseries	\$234.83
Nov. 28, 1945, To W. D. Griffith, Insurance premium on 105 North Avenue	6.19
Dec. 10, 1945, To Heard Bros., for fertilizer	131.20
Bookkeeping fee from October 31, 1945, through February 28, 1946, @ \$5.00 per month	20.00
Total Disbursements	<hr/>
Cash on hand as of February 18, 1946	\$ 392.22
	<hr/>
	\$2,493.29

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The placing of the playground equipment in Baconsfield was left to the discretion of Mrs. George Beggs and Mrs. Kenneth Dunwody.

The parking of automobiles in the park and on the drives has become quite a problem and in some instances dangerous. After some discussion, it was agreed to refer the matter to Mayor Bowden with the request that he have the City Engineer make a survey and recommend a solution.

The Chairman advised the board that top soil from the bottom lands of Baconsfield was being hauled to other parks in the city and it was requested that the Mayor see that this practice was discontinued.

Mr. Gus Sparks submitted a tentative drawing of a proposed master grocery store, fruit stand and drug store and requested that the Managers of Baconsfield name him a price at which they would lease the entire triangular portion between North Avenue and Emory Highway. The sketch of the proposed building was studied by the members of the Board of Managers and after some discussion it was agreed that the Chairman notify Mr. Sparks that a long time lease would be considered on the basis of \$250.00 per month for the rental of the ground.

Mr. Thad Murphey, of Murphey, Taylor & Ellis, appeared before the Board and presented a tentative proposal with reference to leasing the triangular tract of land between North Avenue and Emory Highway to One of the major oil companies which was interested in this location.

In view of both proposals, it was suggested that possibly the two parties could get together and work out suitable space for each project and submit the details to the Board for approval when they had reached an agreement.

[380]

There being no further business, the meeting adjourned.

Dr. W. G. Lee
Chairman

C. E. Newton Jr.
Secretary & Treasurer

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BACONSFIELD PARK COMMISSION

TREASURER'S STATEMENT FROM OCTOBER 31, 1945
TO FEBRUARY 18, 1946

INCOME RECEIPTS

Rents received from Wofford Oil Company from October 31, 1945—November, December, January and February at \$65.00 per month	\$ 260.00
Rents received from J. J. Bowen Fruit Stand from October 31, 1945—November, December & January @ \$10.00 per month	30.00
Rents received from Mrs. Hedeman, 105 North Ave., from October 31, 1945—November, December and January @ \$25.00 per month	75.00
Total Receipts	365.00
Cash on hand as of October 31, 1945	2,520.51
	2,885.51

INCOME DISBURSEMENTS

Nov. 5, 1945	To Central Georgia Nurseries	\$234.83
Nov. 28, 1945	To W. D. Griffin insurance premium on 105 North Ave.	6.19
Dec. 10, 1945	To Heard Bros., for fertilizer	131.20
Bookkeeping fee from October 31, 1945 through February 28, 1946 @ \$5.00 per month		20.00
Total Disbursements		392.22
Cash on hand as of February 18, 1946		\$2,493.29

[382]

Macon, Georgia.

June 3, 1947.

A special meeting of the Board of Managers of Baconsfield was called to order by Dr. W. G. Lee, Chairman, in the Mayor's Office, City Hall, at 4:00 P. M., Tuesday, June 3, 1947. The following members were present:

Dr. W. G. Lee, Chairman

Herbert I. Smart

Mrs. Kenneth Dunwody

Mrs. P. L. Hay, Sr.

C. E. Newton, Jr., Secretary and Treasurer

Mayor Charles L. Bowden and Mr. Clive James attended by invitation.

Minutes of the meeting held February 18, 1946, were read and, upon proper motion, which was duly seconded, they were approved.

The Chairman asked that the Treasurer's report for the period from February 18, 1946, to June 3, 1947, be read. A copy of this statement is hereto attached as part of the minutes. Income receipts for the period amounted to \$1,415.00 and disbursements totalled \$2,477.47. The report showed a balance to the credit of the account as of June 3, 1947, in the amount of \$1,430.82.

The members of the Board of Managers of Baconsfield were invited to attend a meeting of Mayor Charles L. Bowden and a number of his aldermen, which was held just prior to this meeting and was called for the purpose of discussing a proposed appropriation for a swimming pool to be erected on the Baconsfield property. At this meeting Dr. Lee told the members of the urgent need of a swimming pool in Macon and that he had observed that towns of only 20,000 people had, in many instances, [383] more than one pool.

He strongly urged that the members of Council appropriate a minimum of \$100,000.00 for the construction of a pool in Baconsfield.

Mrs. Dunwody reported that she and Mrs. Beggs had agreed on the proper location for placing the children's playground equipment in Baconsfield.

A letter to Mr. Cleveland James, Superintendent of Parks, from Mr. Wallace Miller was read to the joint meeting and, upon proper motion, a copy of this letter is to be incorporated in the minutes as follows:

"May 31, 1947

"Mr. Cleveland James
Superintendent of Parks
North Avenue
Macon, Georgia

Dear Cleveland:

The writing of this letter to you I have had in mind for several years, but on account of first one thing and then another, have never gotten around to it.

Ordinarily, whatever the holder of a public office does that the people approve, is simply taken for granted; but any little thing he might do which the people disapprove, brings immediate criticism and condemnation, and entirely offsets all the good things he may have ever done.

Then again I think we are too prone to wait until a man dies to say any good things about him. Everybody, including the members of the family, discounts post-mortem eulogies of the deceased.

[384] So while you are still with us, and in full possession of your mental faculties and in the enjoyment of apparent robust health, I want to say that your development of Baconsfield Park has been an outstanding job for which

all of our people should be grateful to you. When the azaleas were in full flower I went all over this park and admired its marvelous beauty. In the growing of camellias, azaleas, roses and iris, I claim that you are an expert.

While this park is the one spot that I frequently hear referred to as "Cleveland James' heart," I do not agree with some folks who think the other parks have been neglected. In my opinion you have done an overall splendid job as our Superintendent of Parks.

Faithfully yours

(Signed) Wallace Miller"

Our Board also commended Mr. Cleveland James for the splendid work he was doing and had done over the period of years in taking care of not only Baconsfield but the city parks as a whole.

There being no further business, the meeting adjourned.

Dr. W. G. Lee
Chairman

C. E. Newton Jr.
Secretary & Treasurer

[385]

BACONSFIELD PARK COMMISSION

TREASURER'S STATEMENT FROM FEBRUARY 18, 1946
TO JUNE 3, 1947

INCOME RECEIPTS

Rents received from Wofford Oil Company from February 18, 1946, to June 3, 1947 @ \$65.00 per month	\$ 975.00
Rents received from J. J. Bowen Fruit Stand from February 18, 1946, to June 3, 1947 @ \$10.00 month	150.00
Rents received from Mrs. Hedeman, 105 North Ave., for February, March, April, May, June, July, August & September, 1946 @ \$25.00 month	200.00
Rents received from W. F. Brown, Emory Highway @ \$30.00 month—December, 1946, Jan. & Feb. 1947	90.00
Total Receipts	1,415.00
Balance as of February 18, 1946	2,493.29
	3,908.29

INCOME DISBURSEMENTS

3-19-46	To Central Cotton Oil Co.	47.52
4- 8-46	To A. O. B. Sparks, survey of Emory Highway property	20.00
7- 6-46	To Heard Bros. for fertilizer	24.00
10-21-46	To W. D. Griffith & Son policy on 103 North Ave.	3.66
11-12-46	To W. D. Griffith & Son policy on 105 North Ave.	6.19
12-30-46	To City of Macon for cotton seed meal	101.20
1-10-47	To Heard Bros. for fertilizer	160.90
	To City of Macon for paving	2,000.00
2-13-47	To T. C. James painting & lettering stop signs	5.00
2-14-47	To Macon Board of Realtors for appraisal of land	30.00
3-26-47	To W. W. Crooms for fertilizer	24.00
	To Bank for bookkeeping from February 18, 1946 through December 31, 1946 @ \$5.00 mo.	55.00
	Total Disbursements	2,477.47
	Balance as of June 3, 1947	1,430.82

[386]

Macon, Georgia

August 4, 1947.

A special meeting of the Board of Managers of Baconsfield was held in Mayor Bowden's office, City Hall, at 11:00 A. M., Monday, August 4, 1947. The following members were present:

Dr. W. G. Lee, Chairman
Herbert I. Smart
Mrs. P. L. Hay, Sr.
Mrs. Tom Stewart
Mrs. Frederick Williams
C. E. Newton, Jr., Secretary & Treasurer.

Mayor Charles L. Bowden, John A. Jones and Dan L. Tidwell attended by invitation.

Minutes of the meeting held June 3, 1947, were read and, upon proper motion, which was duly seconded, they were approved.

The Treasurer's report for the period from June 3, 1947, to August 4, 1947, showing income receipts of \$215.00 and income disbursements of \$335.45, leaving a balance as of August 4, 1947, of \$1310.37, was read as information to the Board.

The contract for the construction of the swimming pool in Baconsfield was discussed and, upon proper motion, the following resolution for letting the contract and the construction of the pool was unanimously passed:

"A RESOLUTION"

"BY THE BOARD OF MANAGERS OF BACONSFIELD"

"WHEREAS, The City of Macon desires to construct a swimming pool for the use of the white residents of the City of Macon and has selected as the most suitable site therefor a portion of Baconsfield lying east of

[387] Boulevard Baconsfield, sometimes called North Avenue; and.

"WHEREAS, the Mayor and Council of the City of Macon has appropriated for the construction of such swimming pool, the sum of One Hundred Thousand (\$100,000.00) Dollars, and has offered to turn over the fund so created to the Board of Managers of Baconsfield, so that the said Board of Managers can arrange for the construction and operation of such swimming pool pursuant to the powers vested in said Board by the last will and testament of A. O. Bacon, late of Bibb County, deceased;

"BE IT THEREFORE RESOLVED by the Board of Managers of Baconsfield, in meeting duly assembled, that said Board do accept from the said City of Macon, the said fund of One Hundred Thousand (\$100,000.00) Dollars, the same to be held by the Board of managers in a separate account and as a separate fund and used solely for the purpose of construction of such swimming pool and for the acquisition of all necessary or desirable accessories and buildings in connection therewith.

"BE IT FURTHER RESOLVED, that the Chairman of this Board, Dr. W. G. Lee, and the Secretary-Treasurer of this Board, C. E. Newton, Jr., together with John A. Jones, who is at present Chairman of the Finance Committee of the Council of the City of Macon, and Dan L. Tidwell, who is at present the Chairman of the Recreation Committee of said Council, both of whom have manifested great interest in the construction of said swimming pool upon the said site in Baconsfield, be and they are hereby designated as the Agents of this Board charged with the construction of such swimming pool and adjacent buildings and the acquisition of ac-

cessories necessary [388] thereto, the disbursements of said trust fund to be exclusively within the power and control of the said Secretary-Treasurer of this Board, acting in their official capacities, who shall make such disbursements, however, pursuant only to plans and contracts for such swimming pool, buildings and accessories as have been approved by the said Committee of agents or a majority of them."

It was reported to the Board that the house on North Avenue, formerly occupied by Mrs. Hedeman, was now vacant and authority was given to Dr. Lee, Chairman, and C. E. Newton, Jr., Secretary & Treasurer, to dispose of same to the best advantage.

A request was received from Wofford Oil Company, asking an extension of their lease on the property located at the corner of North Avenue and Emery Highway for a period of ten years from January, 1955. After some discussion, it was agreed that the lease be extended for the ten-year period from January 1, 1955, at a rental of \$75.00 per month, which was an increase of \$10.00 per month over the present monthly rental.

Two bills for attorneys' fees, one in the amount of \$25.00 and the other for \$50.00, from Gus Sparks, were approved for payment.

Dr. Lee advised the Board that he had located some azaleas for planting in the Park and the cost would be approximately \$114.00. This amount was approved for payment.

There being no further business, the meeting adjourned.

Dr. W. G. Lee
Chairman

C. E. Newton Jr.
Secretary & Treasurer

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BACONSFIELD PARK COMMISSION

TREASURER'S STATEMENT FROM JUNE 3, 1947
TO AUGUST 4, 1947

INCOME RECEIPTS

Rents received from Wofford Oil Company from June 3, 1947 to August 4, 1947 @ \$65.00 per month	\$ 195.00
Rents received from J. J. Bowen Fruit Stand from June 3, 1947 to August 4, 1947	20.00
Total Receipts	\$ 215.00
Balance as of June 3, 1947	1,430.82
	<hr/>
	\$1,645.82

INCOME DISBURSEMENTS

7- 3-47 To Peeler Hardware Co.	303.45
7-15-47 Municipal Court of City of Macon —evicting Mrs. Hedeman	4.00
7-15-47 Jones, Jones & Sparks, re evicting Mrs. Hedeman	25.00
7-29-47 Swimming Pool Data and Reference Annual	3.00
Total Disbursements	<hr/> 335.45
Balance as of August 4, 1947	\$1,310.37

[390]

Macon, Georgia
October 16, 1947

A special meeting of the Board of Managers of Baconsfield was held in Mayor Bowden's office, City Hall, at 11:00 A. M., on Thursday, October 16, 1947. The following members were present:

Dr. W. G. Lee, Chairman
Herbert I. Smart
Mrs. P. L. Hay, Sr.
Mrs. Tom Stewart
Mrs. Frederick Williams
C. E. Newton, Jr., Secretary & Treasurer

Mayor Charles L. Bowden, Mayor-Elect Lewis B. Wilson and Stanley Elkan, Chairman of the incoming Finance Committee of the City of Macon, together with John A. Jones and Dan Tidwell, the latter two being members of the Committee to serve on the construction of the swimming pool, attended by invitation.

The minutes of the meeting held August 4, 1947, were read and upon proper motion, which was duly seconded, they were approved.

The Treasurer's report for the period from August 4, 1947, through October 16, 1947, showing income receipts of \$1,205.00 and disbursements of \$189.00, leaving a balance as of October 16, 1947, of \$2,326.37, was read as information to the Board.

The proposed lease with Charles E. Nash for the triangular portion of Baconsfield located between North Avenue and Emory Highway was read in detail and fully discussed. The lease was drawn by A. O. B. Sparks, Attorney

for the Board of Managers of Baconsfield and upon proper motion, which was duly seconded, was unanimously adopted. A copy of this lease [391] is attached to and made a part of these minutes.

The matter of a three year lease with Mr. W. F. Brown on the fruit stand which he erected, facing on Emery Highway, was discussed and the Board agreed to offer Mr. Brown a three-year lease at \$30.00 per month provided all past due rentals were paid up to date.

Due to the fact that Mr. Cleve James would have to vacate the house which he had been occupying for a number of years, the Board recommended that Mr. James be given the sum of \$50.00 per month toward the rental of a home and upon proper motion, which was duly seconded, the following resolution was passed:

“In consideration of the valuable services rendered in the maintenance and upkeep of Baconsfield and the surrender upon request of the premises occupied at the present by Mr. Cleveland James, we recommend that he be given the sum of \$50.00 per month toward the rental of a home and that this be done for the period of six months, with the right to renew same for similar periods so long as his relationship with the Board proves satisfactory to the Board.”

The payment of attorneys fees in the amount of \$125.00 for drawing the lease contract between the Board of Managers and Charles E. Nash and the payment of attorneys fees not exceeding \$250.00 for preparing and presenting a court order to clarify the legal right of the Board of Managers to lease the property to Charles E. Nash were approved.

The matter of appropriating \$40,000.00 for the construction of a bath house was discussed with Mayor-Elect Wilson, Stanley Elkan and Dan Tidwell, members of the incoming City Council. These gentlemen assured the Board of Managers of Baconsfield that they would co-operate to the fullest in appropriating sufficient funds for the construction of the [392] bath house and improving the parking area and grounds around the swimming pool.

There being no further business, the meeting adjourned.

Dr. W. G. Lee
Chairman

C. E. Newton Jr.
Secretary & Treasurer

[393]

BACONSFIELD PARK COMMISSION
TREASURER'S STATEMENT FROM AUGUST 4, 1947
OCTOBER 16, 1947

INCOME RECEIPTS

Rents received from Wofford Oil Company from August 4, 1947 to October 16, 1947 @ \$65.00 per month—Sept. & Oct.	\$ 130.00
Rents received from J. J. Bowen Fruit Stand from August 4, to October 16, 1947 @ \$10.00 per month—July, Aug. & September	30.00
Rents received from W. F. Brown, Emory Highway Fruit Stand @ \$30.00 per month—March & 1/2 April	45.00
Partial Reimbursement from City of Macon for paving in Baconsfield	1,000.00
Total Receipts	\$1,205.00
Balance as of August 4, 1947	1,310.37
	<hr/>
	\$2,515.37

INCOME DISBURSEMENTS

8-15-47	To Jones, Jones & Sparks for preparation of resolution re Swimming Pool	\$ 25.00
	To Jones, Jones & Sparks in re Bibb County Board of Education Open Air School	50.00
10- 7-47	To Calvin Harman Nurseries for purchase of Azaleas plus delivery charges	114.00
	Total Disbursements	<hr/> 189.00
	Balance as of October 16, 1947	<hr/> \$2,326.37

[402]

May 6, 1953.

A special meeting of the Board of Managers of Baconsfield was held on Wednesday, May 6, 1953, at 5:00 P. M., at the Baconsfield Club House. This Meeting was called by C. E. Newton, Jr., Secretary & Treasurer, for the purpose of considering the plans and specifications prepared by Mr. John Leon Hoffman for the further beautification of Baconsfield. The members in attendance were as follows:

Mr. Herbert I. Smart
Mrs. Kenneth W. Dunwody
Mrs. P. L. Hay
Mrs. Frederick W. Williams
Dr. W. G. Lee
C. E. Newton, Jr.

Mayor Lewis B. Wilson, Mr. Cleveland James and Mr. Joe Witherington attended by invitation.

Mr. J. Leon Hoffman presented the plans and specifications to the Board, and, after some discussion, the Board approved the plans as submitted. Mr. Hoffman's charge of \$1,500.00 for the plans and specifications was also approved and the Treasurer authorized to make payment.

Dr. W. G. Lee tendered his resignation as Chairman and a member of the Board of Managers of Baconsfield. His letter of resignation incorporated as a part of these minutes is as follows:

"Mr. C. E. Newton,
Secretary and Treasurer
Baconsfield Park Commission
Macon, Georgia

Dear Friend:

I herewith tender my resignation as Chairman of the [403] Baconsfield Park Commission. My years of service

have been a source of genuine pleasure and the cooperation and confidence of the entire committee has been and will continue to be a source of genuine satisfaction to me. With the present popularity of the property and with the guidance of our committee in the future, I feel that its field of service will grow ever bigger and better.

Assuring you of my genuine appreciation for the privilege of having worked with this committee in one or other capacities since the beginning of the committee's service, I remain

Yours very truly

(Signed) Dr. W. G. Lee"

Dr. Lee's resignation was accepted with regret and all of the members expressed their deep appreciation for the fine work done by him in planning and supervising the planting of Baconsfield, and for his untiring energy and thoughtful planning in making Baconsfield one of the outstanding municipal parks in the Southeast.

[404]

June 25, 1953.

A special meeting of the Board of Managers of Baconsfield was held on Thursday, June 25, 1953, at 4:30 P. M., in the Directors' Room of The First National Bank & Trust Company in Macon. The members in attendance were as follows:

Mr. C. E. Newton, Jr., Chairman
Mrs. T. J. Stewart
Mrs. Frederick W. Williams
Mrs. Kenneth W. Dunwody
Mrs. Herbert I. Smart

Mr. A. O. B. Sparks, Attorney for the Board, attended by invitation.

The Chairman requested Mrs. Kenneth W. Dunwody to act as Secretary for this meeting.

Minutes of the meetings held on April 9, 1951, and May 6, 1953, were read and approved.

A Statement of Cash Receipts and Disbursements for the period from April 1, 1951, through May 7, 1953, was read by the Chairman and, upon proper motion, approved and made a part of the minutes. The total receipts for the period from April 1, 1951, through May 7, 1953, amounted to \$11,211.65 and the disbursements amounted to \$4,507.13, leaving a difference between receipts and expenditures of \$6,704.52. The income cash balance in the amount of \$7,353.94 which was carried forward as on March 31, 1951, together with the receipts over disbursements for the above mentioned period, less commission at 5% on rents received less collection fees charged amounting to \$538.25, left a balance as of May 7, 1953, of \$13,520.21.

A report from Mr. Frank Branan, Treasurer of the City of Macon, in regard to income and expenditures in connection [405] with the operation of Baconsfield swimming pool, was read as information to the Board.

A request from Dr. Milford B. Hatcher, Chairman of the Board of Deacons of Highland Hills Baptist Church, for the use of Baconsfield Club House as a temporary meeting place during the construction of their proposed church building was presented to the Board by Mr. C. E. Newton, Jr., Chairman. Mrs. Kenneth W. Dunwody opened the discussion by reading a letter which she had previously directed to Mr. C. E. Newton, Jr., a copy of which had been sent to each member of the Board, in which she indicated that, according to her interpretation, the use of the club house for religious worship was not "inconsistent with the philanthropic spirit of Senator Bacon's Will and the definition in Webster's dictionary of 'pleasure' ground". Mr. A. O. B. Sparks, Attorney and legal counsel for the Board of Managers, quoted that part of Item IX of the Will of Senator Bacon relating to this property, which reads as follows:

- (1) "it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time [406] for any reason devoted

to any other purpose or use excepting so far as herein specifically authorized."

According to Mr. Sparks' interpretation of the Will, with special emphasis on the words, "in trust for the *sole*, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground" and "under no circumstances" or "at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized", he was very definitely of the opinion that this property should not be used for church services since its use for this purpose could interfere with its enjoyment as a park and pleasure ground for the white children of Macon.

Mr. Sparks states that it was his considered opinion that neither the Board of Managers nor anyone else had any right or power to permit the use of that portion of Baconsfield, which under the terms of the Will cannot be devoted to the purpose of raising revenue, to any use other than that definitely set forth in the Will, that is, for use as a park and pleasure ground; that the use of the Woman's Clubhouse for religious services could not under any proper view be considered as coming within such designation. In that view Mr. Newton concurred at some length.

Both Mr. Sparks and Mr. Newton emphasized the fact that the Board of Managers of Baconsfield are acting in the capacity of Trustees under the Will of A. O. Bacon and, therefore, responsible for carrying out the wishes of the Testator as expressed in his Will.

[407] Mrs. Frederick W. Williams and Mrs. T. J. Stewart, as well as Mrs. Kenneth W. Dunwody, were of the

opinion that the request of the Highland Hills Baptist Church should be granted. Mr. Herbert I. Smart admitted that he understood Mr. Sparks' reason for his interpretation of the Will of A. O. Bacon and agreed to the correctness of his legal opinion, but that, nevertheless, he was in favor of giving the church permission to use the club house.

It was moved by Mrs. Kenneth W. Dunwody that the request of Dr. Milford B. Hatcher, Chairman of the Board of Deacons of the Highland Hills Baptist Church, for use of Baconsfield Club House as a meeting place for their church, be granted. The motion was duly seconded by Mrs. Frederick W. Williams and, upon being put to a vote, was carried, Mr. C. E. Newton, Jr., voting in the negative. Upon recommendation by Mrs. T. J. Stewart, it was decided that the length of time for the use of this property by the church be limited to twelve months, with possible extensions if their proposed church building could not be completed within that period. Also, the Board agreed that any future requests for use of the club house should be handled, as heretofore, by the Baconsfield Club House Commission, the governing body of the present club house owners.

Upon request by the Board, Mr. C. E. Newton, Jr., agreed to submit, within the next thirty days, bids from three contractors as to the cost of grading and other work necessary to carry out the plan submitted by Mr. J. L. Hoffman for the improvement of Baconsfield.

A regular time for meetings of the Board was discussed, and it was agreed that they should be held semi-annually on the second Thursday in March and September of each year.

[408] Tentative suggestions were made in regard to a new member of the Board to be elected to succeed Dr. W. G. Lee. Several names were discussed and Mr. Newton was requested to contact Mr. Frank Willingham. The fact that it would be necessary for anyone selected to be approved

by City Council was also brought to the attention of the Board. (Mr. Frank Willingham's election confirmed by Council on 4-20-54. Letter in file)

The planting of bulbs and other shrubbery for the beautification of Baconsfield Park was discussed. It was agreed that this matter be left to the discretion of Mrs. Stewart and they were requested to take charge of this project.

Upon motion by Mr. Smart, the meeting was adjourned.

C. E. NEWTON JR. MRS. KENNETH W. DUNWODY
C. E. Newton, Jr., Chairman Mrs. Kenneth W. Dunwody,
Acting Secretary

[409]

BACONSFIELD PARK

Statement from April 1, 1951 through May 7, 1953

Income Receipts

Rents from Wofford Oil Co.		1,690.00
Bowen Rents	875.00	
Less R/E Agent's Commission	31.88	843.12
Variety Store	1,250.00	
Less Collection Fees	5.75	1,244.25
Charlie Nash	2,600.00	
Less Collection Fees	5.75	2,594.25
Kiddy Land		1,102.03
Cranford & Ridley	1,950.00	
Less Collection Fees	6.25	1,943.75
Baconsfield Pharmacy	1,800.00	
Less Collection Fees	5.75	1,794.25
Income Balance 3-31-51		11,211.65
		7,353.94
		18,565.59

Disbursements

Commission to bank—5-25-48 thru 3-31-51 \$506.37 less \$120.00 already paid less collection fees	370.87
Boone Ins. Co. premium paid May 1961 and May 1952 on Concession Stand	124.30
Painting and repairs to Clubhouse	750.00
A. M. Grootendorst, Benton Harbor, Mich. for Narcissus and Dutch Iris	243.47
Railway express on shipment from Benton Harbor, Mich	33.22
Davenport Guerry Nursery for 175 Sasanquas	356.25
McKesson & Robbins, Iron Sulphate 30.00 " " " Sprays, Epson Salts, Sulphur & Iron Sulphur 95.06	125.06
Karsten & Denson—3 tons Reliance	189.00
Abbot's Sunny Knoll Nursery— 24 Sasanquas	18.48
Anderson Tractor & Equipment for mower	329.75
Atwood Rose Nursery—600 roses	228.00
Railway express on roses—Tyler, Texas	25.43
Timberlake Groe. Azalea & Camellia Fertilizer	213.30
John Leon Hoffman—Plans	1,500.00
Commission @ 5% on rents received less collection fees charged	14,058.46
Income Balance as of May 7, 1953	538.25
	\$13,520.21

[413]

June 24, 1954

A special meeting of the Board of Managers of Baconsfield was held on Thursday, June 24, 1954, at 3:30 P. M., in the Directors' room of The First National Bank & Trust Company in Macon. The members in attendance were as follows:

Mr. C. E. Newton, Jr., Chairman
Mrs. Frederick W. Williams
Mrs. Kenneth W. Dunwody
Mrs. T. J. Stewart
Mrs. P. L. Hay, Sr.
Mr. Herbert I. Smart
Mr. Frank M. Willingham.

Minutes of the meetings held on June 25, 1953, and December 17, 1953, were read and approved.

A Statement of Cash Receipts and Disbursements for the period from May 8, 1953, through May 10, 1954, was read and approved and made a part of the minutes. The total receipts for the period from May 8, 1953, through May 10, 1954, amounted to \$5,810.07 and the income cash balance which was carried forward as of May 8, 1953, amounted to \$13,520.21, making a total of \$19,330.28. This amount, less total disbursements for the period of \$12,131.89, which includes \$257.86 commission to the bank at 5% on net rentals of \$5,157.17, left a balance as of May 10, 1954, of \$7,198.39.

The renting of the Open Air School to the City of Macon for \$25.00 per month on a year to year basis was discussed. It was stated that this building was to be used as a meeting place for the Happy Hour Club, which is composed of a group of elderly people in Macon. A motion by Mr. Herbert Smart, seconded by Mrs. Frederick Williams, to the effect that this yearly lease be approved, was unanimously carried.

[414] The Board discussed a request from the State Highway Department for widening the right-of-way in front of Baconsfield Club House to the extent of approximately 40 feet. This will necessitate cutting down the oak

tree, another Magnolia and moving the Colonial Dames' monument, together with the marker of Dr. W. G. Lee Boulevard. Mr. Herbert Smart moved that the right-of-way be granted provided the City of Macon would consent to have Lee Boulevard made into a two-way drive. This motion was seconded by Mr. Frank Willingham and unanimously carried, with the provision that Mr. Newton ask that the following conditions be complied with:

1. Remove the cedar tree near the club house and grade the knoll level with the other area.
2. Move the Colonial Dame's monument which is next to the highway to a location acceptable to that group.
3. Move the brick pilaster marking Dr. W. G. Lee Boulevard to another location.
4. Regrade the area in front of Baconsfield so that it will slope toward the highway.
5. Construct concrete sidewalk across the entire area up to Nottingham Drive.
6. Work out satisfactory traffic controls whereby a left turn can be made at Lee Boulevard.

Mr. Newton suggested to the Board that they discuss whether or not they would like to petition the City to move the zoo to some other location, either in Baconsfield or elsewhere. A motion was made by Mrs. Kenneth Dunwody that the City be asked to relocate the zoo in Baconsfield. This motion was seconded by Mr. Herbert Smith and carried. It was the opinion of the Board that the location suggested by Mr. Leon Hoffman, who formulated the overall beautification plan for Baconsfield, would be preferable. Mr. Hoffman suggested [415] that the zoo be moved on the hill where the Georgia Power Company high tension wires are located and between there and the river.

The subject of additional planting of trees, shrubbery and flowers was discussed and it was decided that pro-

fessional help would be necessary for replacement of trees and large shrubbery in view of the tremendous amount of tornado damage. Mr. Newton appointed the four ladies on the Board as a Committee to employ professional help and work out plans for the planting of the area in front of the Club House. They were to elect their own chairman and when prices were secured on completing the necessary work, it was to be submitted to the Board for approval.

The responsibility of security prices for entrance gateways to the Baconsfield property was delegated to Mr. C. E. Newton. It was suggested that these gateways conform to the architecture of the Club House.

Mr. Newton stated that he had been approached by Mrs. W. T. Wood with reference to a site for locating a garden center in Baconsfield, and that he had a conference with the Presidents of the three women's clubs who now own the Baconsfield Club House to ascertain if they would be interested in selling their interests. A communication had been received from the Woman's Club in which they stated that they would not be interested in a sale, but the other clubs had not advised him as to their decisions, the Pilot Club having asked for an extension of time in which to consider it. It was Mr. Newton's thought that the Women's Club might reconsider if the other two clubs were interested in a sale and he suggested that if the various garden clubs would co-operate and provide a substantial part of the necessary funds for the purchase price, that the Board of Managers of Baconsfield would consider making a contribution toward the purchase price. Also, there was some [416] discussion about the garden clubs becoming co-owners and co-operators with the present owners of the Club House.

There being no further business, the meeting adjourned.

C. E. NEWTON JR. MRS. KENNETH DUNWODY
C. E. Newton, Jr., Chairman Mrs. Kenneth W. Dunwody,
Secretary

[417]

S T A T E M E N T
BOARD OF MANAGERS OF BACONSFIELD

May 8, 1953, through May 10, 1954.

INCOME RECEIPTS

Rent from Wofford Oil Co., 12 months @ \$65.00 per month	\$ 78
" " Bowen's Fruit Stand to March 15, 1954,	\$410.00
Less Real Estate Agent's Commission	20.50

" " Baconsfield Kiddy Land	25
" " Dairy Queen, 12 months @ \$75.00 per month	90
" " Open Air School Building, 1 month @ \$25.00	2
" " Charlie Nash, 12 months @ \$225.00 per month	2,70
" " Part of a month	12
Sale of timber from trees damaged by tornado on 3-13-54	64

Total	\$ 5,81

DISBURSEMENTS

Boone Realty & Insurance Co., fire insurance premium on Open Air School	\$ 27.36
Georgia Blue Print Co., & J. L. Hoffman, Inc., Additional blue prints for use in securing bids on grading and for use of members	8.40
Mrs. Kenneth W. Dunwody, reimbursement for bulbs purchased	91.57
Railway Express Co., Express charged on bulbs	16.30
B. M. Richardson, planting winter grass in area in front of Baconsfield Club House	50.00
R. A. Bowen, Inc., Grading as per contract approved by Board	10,660.00
C. W. Farmer Co., Chain and pipe for use along front drive	49.45
Karsten & Denson Co., Winter grass & seed sower	173.80
H. C. Marshall, fertilizer for shrubbery planted around Baconsfield Club House	15.00
C. C. Cato's Nursery, for new shrubbery planted around Baconsfield Club House	12.36
Phillips Garden Mart, for new shrubbery planted around Baconsfield Club House	100.99
Ed Knapp Chain Saw Co., power saw for use in cutting trees damaged by tornado	274.50

(Disbursements—continued)

Wimberlake Grocery Co., 3 tons of Vigoro for Camellias and Azaleas	213.30
Vineville Painting & Decorating Co., for painting con- crete benches	180.00
Macon Blue Print Co., Blue prints for swimming pool and area East of North Avenue	1.00
Commission to Bank at 5% on net rentals of \$5,157.17	257.86
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Total Disbursements	\$12,131.89
Income Balance, May 8, 1953	\$13,520.21
Income Receipts for period from May 8, 1953, thru May 10, 1954,	5,810.07
<hr/>	
Total	\$19,330.28
Less Disbursements for the above period of	12,131.89
<hr/>	
Income Balance as of May 10, 1954,	\$ 7,198.39
Present balance (6-24-54)	\$7,564.04

May 5, 1955.

[418]

A meeting of the Board of Managers of Baconsfield was held on Thursday, May 5, 1955, at 3:30 P.M., in the Directors' room of The First National Bank & Trust Company in Macon. The members in attendance were:

Mr. C. E. Newton, Jr., Chairman
Mrs. Frederick W. Williams
Mrs. Kenneth W. Dunwody
Mrs. T. J. Stewart
Mrs. P. L. Hay
Mr. Herbert Smart
Mr. Frank M. Willingham

Minutes of the meeting held on June 24, 1954, were read and approved.

A statement of Cash Receipts and Disbursements for the period from May 11, 1954, through April 30, 1955, was read and approved and made a part of the minutes. Mr. Herbert Smart moved that this statement be accepted. This motion was seconded by Mrs. Kenneth Dunwody and unanimously carried.

The question of re-opening that portion of Lee Boulevard which had been closed in order to carry out the overall plan for improvement and beautification of Baconsfield was discussed at length. The Board was advised that the petition which had been signed by numerous Macon citizens was drawn and filed with the City officials by Mr. Lawton Miller, Attorney for a group of residents in North Highlands and Shirley Hills. It has been ascertained that many of the people who signed the petition were residents of a section of the City which was not affected by the traffic problem in the North Highlands and Shirley Hills area, this problem having been created by the temporary closing of North Avenue during construction of the highway. The road through Baconsfield [419] was originally closed to carry out the overall beautification program, and former Mayor

Wilson and the Assistant City Engineer and Superintendent of the City Parks gave their consent. It was also stated that the City has no authority to make any changes in the Park without the consent of the Board of Managers of Baconsfield. Each member of the Board expressed his or her personal opinion on the subject. It was thought that the re-opening of this driveway and its use as a short cut or thoroughfare would create a dangerous situation for children who play in the Park. Mrs. Frederick Williams stated that she had always regretted the closing of the driveway as she felt that people derived much pleasure from their drives through that section of the Park. After much deliberation, the question was put to a vote and all members were in favor of leaving the driveway closed with the exception of Mrs. Williams, who voted in the negative.

In view of the fact that a great deal of publicity had been given this matter, some of which was unfavorable, it was the decision of the Board that a letter should be addressed to the Editor of the Macon Telegraph, as well as the Editor of the Macon News, in which the position of the Board of Managers of Baconsfield should be explained and reasons given for their decision.

The Board was advised that the Federated Garden Clubs of Macon would like to construct their building at the corner of Nottingham and Parkview Drives, facing Parkview Drive. It was the consensus of opinion that this building should be far enough back from the street to eliminate any parking hazard and that no parking should be allowed in front, the road to be kept clear at all times. This location was agreed upon and it was the decision of the Board that a contract should be executed and members of the Board should work with representatives from the Federated Garden Clubs in deciding on the [420] exact location.

A suggestion was made that if anyone should call any member and try to get a commitment on any question, they

should be told that it was necessary to decide these things in meeting before expressing an individual opinion.

The possibility of making an additional parking area down by the lily pool was discussed. The Board was advised that Mayor B. F. Merritt had said the City would clear that area so that about 150 to 200 cars could be parked there. This suggestion was unanimously agreed upon.

The recreational area between the Baconsfield Club House and Nottingham Drive was discussed. The Board was advised that the City Engineers had advised nothing could be done with reference to filling in this space unless it was drained. Mayor B. F. Merritt also had agreed that the City would help with this project. Mr. Smart moved that the Chairman look into this matter and obtain figures to bring before the next meeting as to the cost of having this area drained. This motion was seconded by Mrs. Hay and unanimously carried.

The Board also approved the request of the Little League Baseball Association to erect a regulation cyclone fence at the present site of the ball diamond, provided they will give us a letter to the effect that they will move it without cost to the Board of Managers when the play area has been graded and completed.

A suggestion was approved that the site of the Open Air Theatre, which, at the present time, has only outside wall foundations and is grown up in shrubs and trees, be cleared and the brick and concrete removed.

A right-of-way through the front of the park for a drain ditch to take water down to the river was approved.

[421] Upon being advised that Mrs. Bowen was six months in arrears with her rent and no new contract had been signed, the Board agreed that she should be asked to get a new location within a 90-day period.

Mrs. Dunwody suggested that the avenue of oaks be named "The Cleveland James Avenue of Oaks" and that a bronze marker be erected, bearing an inscription that this

was in appreciation of Mr. James' services in the Macon parks, especially Baconsfield. The Board was unanimous in their agreement that this should be done and the ladies were requested to get the marker. After some discussion as to remuneration for Mr. James, the Board having been advised that he had received none from the Board for about four or five years, Mr. Smart moved that \$1,000.00 be paid Mr. James in a lump sum for past services and what has been accomplished up to date. This motion was unanimously carried.

Entrance gates to the park were discussed, but in view of the fact that prices which had been obtained were considered too high, it was decided that this matter should be postponed. In the discussion, the fact was brought out that the Highway Department had agreed to replace the one entrance pilaster marking W. G. Lee Boulevard.

The Emery Highway marker which was destroyed by Charlie Nash was also discussed. The Board decided that this marker should be replaced on Baconsfield land and Mr. Newton agreed to get some prices on a new marker.

The Board was informed that the A. & P. Tea Company would like to lease the site in the rear of the Dairy Queen which is the present location of the Happy Hour Club. After some discussion, it was decided that a letter should be written to Mayor B. F. Merritt, requesting that a new location for the Happy Hour Club be obtained within ninety days.

[422] After the conclusion of the business session, Mr. Frank Willingham expressed his appreciation to the Board for allowing the Highland Hills Baptist Church to meet in the Baconsfield Club House during the time their church building was under construction.

The meeting was then adjourned.

C. E. NEWTON JR. PAULINE H. DUNWODY
C. E. Newton, Jr., Chairman Mrs. Kenneth W. Dunwody,
Secretary

[423]

S T A T E M E N T
BOARD OF MANAGERS OF BACONSFIELD

May 11, 1954 through April 30, 1955

INCOME RECEIPTS

Rent from Pure Oil Co., 7 months @ \$65.00 and 5 months @ \$75.00				
" " Bowen's Fruit Stand to Nov. 15, 1954	277.00	\$	830.00	
Less Real Estate Agent's Comm.	13.85		263.15	
" " Dairy Queen, 12 months @ \$75.00			900.00	
" " Open Air School, 11 months @ \$25.00			275.00	
" " Charlie Nash, 11 months @ \$225.00			2,475.00	
Total				\$ 4,743.15

DISBURSEMENTS

Boone Realty & Insurance Co., fire insurance premium, 125 Emery Highway	23.10
Cleveland James for payment to 3 men @ 85¢ per hour	81.60
Thos. H. Hall, III for appraisal 200 Spring Street	65.00
Ingleside Nurseries for 42 water oaks	324.45
T. C. James for telephone call to McMinnville, Tennessee	2.04
C. W. Farmer for pipe and chain	63.11
Cato's Nursery for 6 Holly, 8 Magnolia	75.20
Georgia Blue Print Co., for master plan Baconsfield	6.20
R. A. Bowen for grading and labor in removing trees in rear of Baconsfield Club House	894.20
Commission to Bank at 5% on rentals of \$4,743.15	237.15
Total Disbursements	1,772.05
Income Balance, May 11, 1954	7,198.39
Income Receipts for period from May 11, 1954 through April 30, 1955	4,743.15
Less Disbursements for the above period	11,941.54
	1,772.05
Income Balance as of April 30, 1955	\$10,169.49

[424]

May 17, 1955.

A called meeting of the Board of Managers of Baconsfield was held on Tuesday, May 17, 1955, at 3:30 P. M., in the Directors' room at The First National Bank & Trust Company in Macon. The members in attendance were as follows:

Mr. C. E. Newton, Jr., Chairman
Mrs. Kenneth Dunwody
Mrs. T. J. Stewart
Mr. Herbert Smart
Mr. Frank M. Willingham

Upon motion by Mrs. Kenneth Dunwody, seconded by Mr. Herbert Smart, the reading of the minutes of the meeting held on May 5, 1955, was postponed until the next meeting.

A letter of thanks for use of the Baconsfield Clubhouse by the Highlands Hills Baptist Church, signed by Dr. Milford Hatcher, Chairman of the Board of Deacons, was read to the Board. A letter from Mr. Spain Willingham, requesting that consideration be given to the re-opening of the closed portion of W. G. Lee Boulevard, was brought to the attention of the Board.

A summary was given of the meeting at the City Hall on May 10, 1955, with the Police and Park Committee, at which meeting the petition signed by numerous Macon citizens, requesting the re-opening of the closed portion of Lee Boulevard, was read. Mr. Newton, Mrs. Dunwody, Mrs. Williams, and Mr. Smart attended this meeting.

The Board were advised that Mr. Newton, Mr. Willingham and Mr. Hoffman met with Mayor B. F. Merritt, Chief of Police Ben T. Watkins, Captain Knight, Julius Gholson, Douglas Feagin and William Branan at Baconsfield on May 16th, for the purpose of discussing the re-opening of the driveway and other pertinent [425] facts in connection therewith.

The members of the Board studied the proposed plan for the driveway drawn by Mr. William Branan, City Engineer. Under this plan the driveway would be widened and the curve made more gradual and less dangerous, but it would necessitate cutting down several magnolias and a pecan tree. Counter proposals for other routes were also discussed, as well as the question of whether it should be temporary or permanent. According to our attorney's opinion, the Board of Managers could not be forced to open the road through the park. This was brought to the attention of the members, but they all agreed that they would like to avoid any legal proceedings. It was thought that safety should be the primary consideration in making a decision. After much deliberation, the following decision was reached:

The Board of Managers of Baconsfield will agree to the re-opening of that part of Lee Boulevard which was closed in 1953 on the following conditions:

1. That it be paved with concrete and proper curbing used according to the City Engineer's plan for safe 2-way traffic, only two magnolias to be removed at this time.
2. That the speed on the road be limited to 15 miles per hour.
3. That the City will agree to pave by March 1, 1956, that portion of the proposed driveway off of Lee Boulevard to the Northwest through the group of dogwood trees and up to the unpaved road connecting with Parkview Drive.
4. That during the remainder portion of this present administration the City will agree to pave with concrete the balance of this road to Parkview Drive and if it is found necessary to widen Parkview Drive

from this intersection to Nottingham Drive, that it [426] will be done.

5. That all traffic in any direction through the Park be 2-way traffic and regulated by appropriate signs and patrolled by City police and that no trucks or busses will be allowed through the Park.
6. That the curve in the driveway at the end of the lily pond be redesigned and finished in concrete according to the City Engineer's specifications and upon approval by the Board of Managers of Baconsfield.
7. City Council to approve this over-all plan and agree in writing that it will be carried out at no cost to the Board of Managers of Baconsfield.

It is the unanimous opinion of the members of the Board of Managers of Baconsfield that the Park was set aside by Senator Bacon for the use and enjoyment of the citizens of Bibb County and the main objective of the members of the Board is safety for children and others using the Park. The members of the Board do not condone the use of the driveways through the Park as traffic arteries or thoroughfares.

It was suggested that this be discussed with Mayor Merritt as a tentative agreement, subject to the approval of Mr. A. O. B. Sparks, Attorney for the Board of Managers, and that Mr. Sparks draw up a legal agreement to be signed by the City officials and the Board of Managers of Baconsfield.

The meeting was then adjourned.

C. E. NEWTON JR. PAULINE H. DUNWODY
C. E. Newton, Jr., Chairman Mrs. Kenneth W. Dunwody,
Secretary

[427]

October 14, 1955

A meeting of the Board of Managers of Baconsfield was held on Friday, October 4, 1955, at 3:30 P. M., in the Directors' room of The First National Bank & Trust Company in Macon. The members in attendance were:

Mr. C. E. Newton, Jr., Chairman
Mrs. Frederick W. Williams
Mrs. Kenneth W. Dunwody
Mrs. P. L. Hay
Mr. Frank M. Willingham

Minutes of the two previous meetings held on May 5, 1955, and May 17, 1955, were read and approved.

A statement of cash receipts and disbursements for the period from May 1, 1955, through September 30, 1955, was read and approved and made a part of the minutes.

The Committee discussed helping the Baconsfield Clubhouse Commission to finance the painting of the club house as well as the purchase of blinds and screens. It was thought that it would be to the advantage of the Board of Managers of Baconsfield for the club house to be painted in order to carry out the overall beautification plans for the park. Mrs. Dunwody suggested that the grounds be improved by having some paving done and planting grass and shrubbery. Mrs. Frederick Williams moved that \$1,000.00 be given to the Baconsfield Clubhouse Commission to be used, first, on the outside of the building for painting, blinds and screens. This motion was seconded by Mrs. P. L. Hay and unanimously carried.

Another location for the Federated Garden Club building was discussed, the neighbors having opposed the location at the corner of Nottingham and Curry Drives. It was

stated that the only other location would be where the zoo is located. [428] The Board were advised: That Mayor B. F. Merritt had said he would put the cost of moving the zoo in the City budget for next year; and that Mr. Sidney McNair had raised money to take care of gas connections for the Garden Center, which would be necessary if they build at the zoo location. The Board decided it would be satisfactory to relocate the Federated Garden Club building at the present zoo site, provided the City will move the zoo to Central City Park, with the understanding that the Garden Clubs put in the connections for gas and other facilities.

Entrance gates and a marker for Lee Boulevard were discussed. After some discussion, Mrs. Williams agreed to ask Dr. Lee if a temporary marker similar to those used to mark streets would be satisfactory to him. The marker for Emery Highway was also discussed and Mr. Newton agreed to tell Mr. Jack Smith to put the marker on the right-hand side, leaving it up to Mr. Smith as to the size.

Additional picnic tables for the park were discussed. It was thought that these tables should be the type which have benches on each side and the table in middle. Repairs to the benches already in the park were also agreed upon. At the suggestion of Mr. Frank Willingham, the Board agreed that worn-out benches should be replaced with iron benches. At the request of the Board, Mr. Willingham agreed to attend to this matter. It was suggested that some of the benches be put near the bus stop.

Regarding the grading of the football field and baseball diamond, Mr. Newton stated that he was working on this with Mr. Claude Lewis of the Recreation Department of the City and that prices and other pertinent information would be brought to the attention of the Board.

Mrs. Dunwody suggested that some necessary paving be done near the club house and the balance planted in grass. [429] The ladies agreed to get together in about two weeks to see what could be done about the paving and planting of shrubs. It was suggested that Mr. Frank Willingham take up with Joe Witherington the paving in the back and get Mr. Witherington's views about it.

The meeting was then adjourned.

C. E. NEWTON JR. PAULINE H. DUNWODY
C. E. Newton, Jr., Chairman Mrs. Kenneth W. Dunwody,
Secretary

[430]

S T A T E M E N T
BOARD OF MANAGERS OF BACONSFIELD
 From May 1, 1955 through September 30, 1955

INCOME RECEIPTS

Rent from Pure Oil Co. 5 months @ \$75.00	\$ 375.00
" " Dairy Queen, 4 months @ \$75.00	300.00
" " Open Air School, 5 months @ \$25.00	125.00
" " Charles Nash, 5 months @ \$225.00	1,125.00
Total Income Receipts	\$ 1,925.00

DISBURSEMENTS

Boone Realty & Insurance Co. fire insurance premium on Concession Building	23.10
Gift to T. C. James	1,000.00
Commission to Bank at 5% on rentals of \$1,925.00	96.25
Total Disbursements for period	1,119.35
	<hr/>
	\$ 805.65
Income Balance May 1, 1955	10,169.49
Income Balance September 30, 1955	\$10,975.14

[431]

April 19, 1956.

A meeting of the Board of Managers of Baconsfield was held on Thursday, April 19, 1956, at 4:00 P. M., in the Director's room of The First National Bank & Trust Company in Macon. The members in attendance were:

Mr. C. E. Newton, Jr., Chairman
Mrs. Frederick W. Williams
Mrs. Kenneth W. Dunwody
Mr. Herbert Smart
Mrs. Frank M. Willingham

Minutes of the meeting held on October 14, 1955, were read and approved.

A statement of cash receipts and disbursements for the period from October 1, 1955, through April 15, 1956, was read and approved and made a part of the minutes.

The subject of the removal of the quonset hut formerly occupied by Mrs. Bowen's fruit stand was discussed. The Board were advised that this hut was purchased by Mr. Sam Hall and he had agreed to remove it; also, that he had been advised that a ground rental of \$35.00 per month would be charged unless the hut was removed not later than May 1, 1956.

The entrance gates for the park were discussed. Mrs. Williams and Mrs. Dunwody stated that they had an appointment to see Mrs. League about plans for these gates on May 7, 1956.

Removal of the zoo was again discussed at length, and the Board were advised that Mayor B. F. Merritt had not, as yet, done anything about this. The Board decided that the elk should be moved to a shady spot. Mrs. Williams and Mr. Willingham were authorized and agreed to make arrangements for this and provide for another pen and a shelter.

[432] The Board discussed permitting the Little League baseball team to put advertising signs on their fence and sell coca colas and sandwiches. Attorney A. O. B. Sparks' opinion in regard to this matter was brought to the attention of the Board. Mr. Sparks stated that in granting this permission, the Board would not be violating the terms of the Will, but it would be a matter of policy with the Board, since there might be other requests of a similar nature. Mrs. Dunwody called attention to the fact that a precedent might be established. She also mentioned that signs were commercial and detracted from the beauty of the park; and that the trash created by coca cola tops and wrappings from sandwiches was undesirable. It was thought by others in the group that this was probably the only way in which the Little League could finance their team. After some discussion, Mrs. Williams moved that the Little League be permitted to continue for one year to put advertising signs on their fence and sell coca colas and sandwiches. This motion was seconded by Mr. Willingham and carried, Mrs. Dunwody voting in the negative.

Mr. Newton explained the plan of the City of Macon to run a sewer line through Baconsfield, stating that he had obtained an opinion from Attorney Sparks to the effect that the City had no right to do this without the consent of the Board of Managers. Mr. Sparks was of the opinion that the Board of Managers should negotiate with the Board of Water Commissioners in an effort to work out some mutually satisfactory arrangement. The Board of Managers were advised that Mr. Emory Matthews, Secretary & Treasurer of the Board of Water Commissioners, is getting plans together and will discuss these with Mr. Newton.

The Board of Managers were also advised that Mr. Newton and Dr. W. G. Lee, Chairman of the Alexander School Board, had discussed the construction of basket

ball and [433] tennis courts at Baconsfield. In view of the fact that the children who attend Alexander III use this playground, it was thought that the Alexander School Board might be interested in financing this construction.

The planting of shrubs and flowers and carrying out of the overall program suggested by Mr. Hoffman was discussed; and the Board agreed that about \$400.00 or \$500.00, or whatever amount might be necessary, should be used in the continuance of this project.

The problem of speedsters in the park was brought up. Mr. Smart agreed to talk with the Chief of Police about having someone in the park during the hours of 7:30 to 9:30 A. M., and from 4:00 to 6:00 P. M., to correct this practice.

Mrs. Kenneth Dunwody tendered her resignation as Secretary of the Board of Managers; which, upon proper motion, was accepted. Mr. Frank Willingham was nominated to succeed Mrs. Dunwody as Secretary, and was unanimously elected.

Mrs. Dunwody called attention to the marker for the "Avenue of Trees", stating that it would probably be finished by the first of May. She suggested that plans be made for the unveiling of this marker as a tribute to Mr. Cleveland James on May 10, 1956, at 4:00 P. M. This suggestion met with the approval of the Board of Managers.

Attention was called to the need for two benches instead of just the one which had been placed near the bus stop. The Board agreed that this should be done.

There being no further business, the meeting was adjourned.

/s/ C. E. NEWTON, JR.

C. E. Newton, Jr., Chairman

/s/ MRS. KENNETH W. DUNWODY

Mrs. Kenneth W. Dunwody, Secretary.

[434]

STATEMENT

BOARD OF MANAGERS OF BACONSFIELD

From October 1, 1955 through April 15, 1956

INCOME RECEIPTS

Rent from Pure Oil Co. 6 months @ \$75.00	\$ 450.00
" " Dairy Queen, 6 months @ \$75.00	450.00
" " Open Air School, 7 months @ \$25.00	175.00
" " Bowen-Balance due Nov. 15, 1955 and part on Dec. 15, 1955, less R/E Comm.	23.75
" " Charles Nash, 7 months @ \$225.00	1,575.00
 Total Income Receipts	 \$ 2,673.75
Balance as of October 1, 1955	10,975.14
	 \$13,648.89

DISBURSEMENTS

Baconsfield Clubhouse Commission	1,000.00
Karsten & Denson—fertilizer and rye grass	160.50
Macon Electric & Blueprint Co.	2.50
John Hoffman Associates in re advice and preparation of plan for paving area on side and rear Clubhouse	50.00
Central Sash & Door Co. lumber for benches	63.00
Coley's Nursery—6 Hollies and 20 Japonica	133.50
Frank Green for fertilizer	7.00
Karsten & Denson—fertilizer and peat moss	24.52
W. S. Goldwire for painting benches	200.00
Dr. Lee for pink dogwood trees	60.00
Sam Hall & Sons for paving, brick walk and repairs to Woman's Club	3,392.10
Conditioned Air, Inc. for removing tower and pump and reinstall after grading, Woman's Clubhouse	93.75
Inglewood Nurseries—6 water oaks and 1 tulip poplar	69.53
C. W. Farmer Co. pipe and well chain	145.01
Hall & Sons planting grass, grading	300.00
Commission to Bank @ 5% of rentals	133.69
 Total Disbursements	 5,835.10
Balance as of April 15, 1956	\$ 7,813.79

[443]

May 8, 1958.

A meeting of the Board of Managers of Baconsfield was held on Thursday, May 8, 1958, at 3:30 P. M., in the Directors' room of The First National Bank & Trust Company in Macon. Members in attendance were:

Mr. C. E. Newton, Jr., Chairman
Mrs. Kenneth W. Dunwody
Mrs. P. L. Hay
Mrs. Frederick Williams
Mrs. T. J. Stewart
Mr. Frank M. Willingham

Due to illness, Mr. Herbert Smart could not attend.

Minutes of the meeting held on September 13, 1957, were read and approved.

A statement of cash receipts and disbursements for the period from April 1, 1957, through March 31, 1958, was read. A motion by Mr. Frank M. Willingham, seconded by Mrs. Frederick Williams, that this statement be approved, was unanimously carried.

The Board considered the purchase of fill dirt to fill in the area back of the former site of Mrs. Bowen's fruit stand and the Happy Hour Club. Mr. C. E. Newton, Jr., stated that this dirt could be purchased from Logan Lewis at 50¢ per load, or a total cost of approximately \$5,000.00, including cost of delivery. Mr. Frank Willingham moved that Mr. Newton be given authority to act and close the deal for this purchase at these figures. The Board was also advised that it would cost approximately \$1,500.00 to place a 30-inch concrete drain sewer from the site of the Dairy Queen building to the property line so that this area could be filled. The motion was seconded by Mrs. Frederick Williams and unanimously carried.

[444] Definite dates for holding the semi-annual meetings of the Board of Managers were discussed. It was unanimously agreed that these meetings be held on the last Thursday in April and October, each year.

After a lengthy discussion as to further development of the overall plan prepared by Mr. Hoffman, it was suggested that the ladies on the Board contact Mr. Frank Willingham in regard to the construction of suitable walks in front of the club house and that the planting of bulbs, shrubs and flowers be continued.

The present marker to Senator A. O. Bacon, which is now located in the zoo area, has a mistake in the lettering; and an estimate of the expense of correcting this mistake and moving the monument to another location was discussed and prices for this work are to be secured. Members of the Board are to be notified and a suitable site selected by Mrs. Frederick Williams and the other lady members of the Board.

The removal of the zoo to another location in the park or to Central City Park was discussed. Mrs. Kenneth Dunwody moved "that the Board propose to Mayor B. F. Merritt that in lieu of cutting the driveway from Lee Boulevard to the road near the picnic area, which he promised to do, that he move the zoo; and the Board Managers would appropriate up to \$1,500.00 for the purpose of helping defray the expenses of this removal." This motion was seconded and unanimously carried.

Mrs. T. J. Stewart suggested that trash cans be placed near the benches at the bus stop on North Avenue. It was also suggested that shrubbery be planted to conceal the trash cans back of Baconsfield Clubhouse.

[446]

STATEMENT

BOARD OF MANAGERS OF BACONSFIELD

From April 1, 1957 through March 31, 1958

INCOME RECEIPTS

Rent from Pure Oil Co., 12 months @ \$75.00	\$ 900.00
" " Dairy Queen, 12 months @ \$75.00	900.00
" " Happy Hour Club, 12 months @ \$25.00	300.00
" " Charles Nash, 12 months @ \$225.00	2,700.00
	<hr/>
From Board of Water Commissioners for sewer easement	4,800.00
	<hr/>
	3,500.00
	<hr/>
Income Balance as of April 1, 1957	8,300.00
	<hr/>
	4,962.77
	<hr/>
	\$13,262.77

DISBURSEMENTS

Luther William's Son, insurance to 5-28-58 on 125 Emery Highway	26.28
Purchase of narcissus bulbs	26.20
T. C. James for Christmas tree for Clubhouse	15.00
George W. Bass, decorating and dismantling Christmas Tree	10.00
C. W. Farmer for Christmas tree wire and lights	63.99
Baconsfield Clubhouse for electric current for Christmas tree	14.47
Central Georgia Fertilizer Co. for fertilizer	116.00
Commission to bank @ 5% on rentals of \$4800.00	240.00
	<hr/>
Total Disbursements	511.94
	<hr/>
Balance as of March 31, 1958	\$12,750.83

[450]

May 8, 1959.

A meeting of the Board of Managers of Baconsfield was held on Friday, May 8, 1959, at 4:00 P. M., in the Directors' room of The First National Bank & Trust Company in Macon. Members in attendance were:

Mr. C. E. Newton, Jr., Chairman
Mrs. Kenneth W. Dunwody
Mrs. Frederick W. Williams
Mrs. T. J. Stewart
Mrs. P. L. Hay
Mr. Frank M. Willingham, Secretary.

Minutes of the meeting held on October 28, 1958, were read and approved.

Mrs. Williams nominated Mr. George Rankin as a member of the Board to fill vacancy created by the resignation of Mr. Herbert Smart. This nomination was seconded by Mr. Willingham; Mr. Rankin was unanimously elected and attended this meeting.

A statement of cash receipts and disbursements for the period from April 1, 1958, through March 31, 1959, was read and discussed. Upon motion by Mr. Willingham, seconded by Mrs. Hay, this statement was unanimously approved.

A letter from the Baconsfield Clubhouse Commission, setting out the necessity for putting a new roof on the club house, was read to the Board. After some discussion, Mrs. Dunwody moved that \$1,000.00 be given to the Baconsfield Clubhouse Commission for the purpose of helping to install a new roof, with the hope that the club house would also be painted in the near future. This motion was seconded by Mr. George Rankin and unanimously carried.

The Board were advised that Mr. Cleve James would [451] like to have about 10 links of 50-foot hose, together

with sprinklers, in order that the shrubs and flowers might be kept watered. The group agreed to the purchase of these items, as well as about \$225.00 worth of top soil.

The location of the former wading pool was discussed and Mr. Rankin agreed to look into the possibility of again using its as a wading pool; or, if this seemed impractical, converting it into playground or parking area.

As information, to the Board, they were advised that \$1,084.93 had been transferred from the old swimming pool account to the regular account of the Board of Managers of Baconsfield. They were also informed that \$4,500.00 had been spent for dirt filling in the area between swimming pool and Spring Street and back of the building occupied by the Happy Hour Club.

The Board again agreed to permit the Little League players to post signs on the fence around the baseball diamond for another year during the baseball season. It was also suggested that another Little League field be put in Baconsfield, if needed; and Mr. Willingham agreed to be on the lookout for this.

A cash gift to Mr. Cleve James for his work in putting in the watering system was considered. A motion by Mr. Willingham that \$500.00 be given to Mr. James was seconded by Mrs. Hay and unanimously carried.

Mrs. Williams moved that Mrs. Dunwody be given at least \$500.00 to be used for the beautification of the park, planting additional shrubbery and flowers. This motion was unanimously carried.

The meeting was then adjourned.

/s/ C. E. NEWTON, JR.

C. E. Newton, Jr., Chairman.

/s/ FRANK M. WILLINGHAM

Frank M. Willingham, Secretary.

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STATEMENT**BOARD OF MANAGERS OF BACONSFIELD**

From April 1, 1958 through March 31, 1959

INCOME RECEIPTS

Rent from Pure Oil Co., 12 months @ \$75.00	\$ 900.00
“ “ Dairy Queen, 12 months @ \$75.00	900.00
“ “ Happy Hour Club, 12 months @ \$25.00	300.00
“ “ Charles Nash, 12 months @ \$225.00	2,700.00
	<hr/>
	4,800.00
Sale of Stumpage to L. F. Griffin	293.70
	<hr/>
	\$5,093.70
Balance as of April 1, 1958	12,750.83
	<hr/>
	\$17,844.53

INCOME DISBURSEMENTS

Total Income Disbursements (see itemized list)	\$10,513.49
Commission @ 5% on rents of \$4,800.00	240.00
Income Balance as of March 31, 1959	<hr/> \$ 7,091.04

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STATEMENT

BOARD OF MANAGERS OF BACONSFIELD

From April 1, 1959 through March 31, 1959—List of Disbursements

Luther Williams Son, insurance on 125 Emery

Highway	\$ 26.28
R. A. Bowen, furnishing and installing concrete pipe at Happy Hour Club	900.00
Central Sash & Door Co. for 3 joggling boards	154.50
Jones, Sparks, Benton & Cork fee for service re Board of Water Commissioners for Sewer Line Lease	150.00
Frank B. West survey south of Emery Highway and North Avenue	250.00
C. C. Matthews for damage to garden	10.00
Mrs. Kenneth Dunwody for bulbs	50.17
Mrs. N. Logan Lewis for purchase of dirt	5,400.00
Adams-Feagin Hardware Co. for footballs and basketballs	48.11
T. C. James for bulbs and express	38.22
T. C. James for Christmas Tree	15.00
C. W. Farmer for Christmas Tree lights	57.13
George W. Bass for decorating tree	10.00
G. A. Spence for decorating tree	5.00
Baconsfield Clubhouse for electric bill for lighting tree	14.47
Lowe Electric Co. for lamps	20.61
Sam Hall & Sons for asphalt walk	1,300.00
Central Georgia Fertilizer Co.	240.00
Mathis-Akins Concrete Block Co.	78.00
Mrs. T. C. James, payroll, 2-20-59	178.00
Mrs. T. C. James, payroll	60.00
Mrs. T. C. James payment on contract T. C. Huckabee for part labor on installing water system	167.50
Mrs. T. C. James labor on sprinkler system	300.41
Marbut Co. for material and pipe for sprinkler system	632.09
Phillip Garden Mars for shrubbery	407.70
Total Disbursements	\$10,513.49

[474]

July 24, 1962

A call meeting of the Board of Managers of Baconsfield was held in the Directors' Room of The First National Bank and Trust Company in Macon at 11:00 A. M. on July 24th, 1962, with Mrs. P. L. Hay, Mrs. Kenneth Dunwody, Mr. George Rankin, Mr. Frank Willingham and Mr. C. E. Newton, Jr. attending. Mrs. Frederick Williams was out of the City and was, therefore, unable to attend.

After a call to order by the Chairman and the reading and approval of the minutes of the meeting held May 21st, 1962, Mr. Newton told the Board that since he was Chairman of the Board of Managers of Baconsfield and, also, Chairman of the Board of the Bank, he would like to be excused from the meeting and turn the next item of business over to Mr. George Rankin for handling.

At this point, Mr. Rankin took charge, advising the Board that The First National Bank & Trust Company in Macon would like to negotiate a ground lease of space in Baconsfield for a five year period, with an option for an additional five years. A map was consulted, showing the exact location of the proposed rental area and a letter from Mr. Thomas H. Hall, III, M. A. I., was submitted to the Board stating that Mr. Hall considered \$150.00 per month as the fair market net rental for the property.

After a brief discussion and upon motion by Mrs. Kenneth Dunwody, seconded by Mrs. P. L. Hay, the following resolution was unanimously adopted:

"RESOLVED, That the Board approve a ground rental of space in Baconsfield fronting on Emery Highway approximately 200 feet, and between the Western line of the ground leased to the Dairy Queen store and the Eastern line of the ground leased to Wofford Oil Company, and going back in a Southerly direction [475] approximately 120 feet, to The First National Bank and Trust Company

in Macon for a period of five years, with an option to The First National Bank and Trust Company in Macon for an additional five years for a ground rental of \$150.00 per month, the said The First National Bank & Trust Company in Macon to have the right to remove from the premises any and all buildings and improvements erected by them at the termination of the lease.

"Be it further resolved that Mr. George Rankin, a member of the Board, and Mr. Frank Willingham, Secretary of the Board, be hereby authorized to sign the lease on behalf of the Board of Managers of Baconsfield."

Mr. Newton was then recalled to the meeting and a discussion was held regarding the lighting of the tennis courts in the park. It was brought out that one court is now lighted, while two are not. The Board Members generally agreed that not only should lighting of a modern design be installed on the unlighted courts, but that the old lights should probably be replaced with new ones. Mr. Newton told the Board he felt that the City would probably do the work if the Board would furnish the materials and promised to contact Mr. Spence of the City about doing the work and, also, about the best lights to use. He is to advise the Board of the approximate cost and get their verbal approval by telephone before the work is done.

There being no further business, the meeting adjourned.

/s/ **GEORGE P. RANKIN**

George P. Rankin, Acting Chairman

/s/ **FRANK M. WILLINGHAM**

Frank M. Willingham, Secretary

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STATEMENT**BOARD OF MANAGERS OF BACONSFIELD**

From October 1, 1961 through September 30, 1962

INCOME RECEIPTS

Rent from Pure Oil Co.	12 months @ \$75.00	\$ 900.00
Rent from Dairy Queen	12 months @ \$116.67 plus additional due on 1961	1,583.41
Rent from Happy Hour Club	11 months @ \$25.00	275.00
Rent from Chas. E. Nash	12 months @ \$225.00	2,700.00
		<hr/>
		5,458.41
Balance as of September 30, 1961		10,907.79
		<hr/>
		16,366.20

INCOME DISBURSEMENTS

10-26-61	Minton Farm Supply for rye grass and cotton seed meal	\$ 134.75
11-1-61	Mrs. Kenneth W. Dunwody for 200 Hemerocallis	70.00
11-2-61	W. T. Wacter for 35 loads of sandy top soil	157.50
	Mrs. T. C. James for 2 packages of Garden bulbs	49.97
12-15-61	Mrs. T. C. James for Christmas Tree at Baconsfield	25.00
12-20-61	Bob Jones for decorating tree	7.50
	Terry Hitchcock for decorating tree	7.50
	E. R. Spence for decorating tree	7.00
	Fred Stanton labor replacing lights in wires for stringing Christmas Tree	5.00
	C. E. Newton, Jr. for Moravian Star and light bulb for top of Christmas Tree	3.30

Disbursements (Cont'd.)

1-5-62	Hennis Freight Lines, Inc. for freight on six picnic tables	41.58
1-16-62	Norway Manufacturing Co. for six picnic tables	212.40
1-23-62	Peeler Hardware Co. Lights for Christmas Tree in front of Clubhouse	8.38
2-19-62	Central Ga. Fertilizer Co. for Azalea special fertilizer	400.00
3-19-62	Macon Blueprint Co. for two copies of Baconsfield Pool Map	1.24
4-6-62	Luther Williams Son for premium on 137 Emery Highway	27.90
5-21-62	Gift to Mr. T. C. James as voted by the Board	500.00
7-17-62	Mrs. Kenneth W. Dunwody for purchase of tulip and daffodil bulbs	55.50
9-25-62	Mrs. Kenneth W. Dunwody for purchase of narcissus bulbs from Miss Willie Rice	50.00
[477]		
9-27-62	Macon Feed & Seed Co. for 600 lbs. Rye Grass	44.70
	Central Cotton Oil Co. for 3,000 lbs. of Cotton Seed Meal	93.75
		1,902.97
	Commission @ 5% on rents of \$5,458.41	272.92
		2,175.89
	Income Balance as of September 30, 1962	14,190.31

[482]

April 9, 1963

A meeting of the Board of Managers of Baconsfield was held in the Directors' Room of The First National Bank & Trust Company in Macon at 3:30 P. M. on April 9th, 1963, with all members present.

The Chairman, Mr. C. E. Newton, Jr., began the meeting by welcoming the new member of the Board, Mrs. Francis K. Hall, and expressing the Board's thanks to Mr. Gus Sparks, Jr., Attorney for the Board, for his presence. Mr. Newton also commented on the beauty in Baconsfield during the Spring season and all members concurred that many favorable comments had been received. The tulip beds drew the most praise and some thought was given to further plantings in the triangle at Nottingham Drive and Dr. W. G. Lee Parkway.

Minutes of the meeting held November 9, 1962, were read and approved.

A statement of cash receipts and disbursements for the period from April 1st, 1962, through March 31, 1963, was presented to each member of the Board and approved to become a part of the minutes. Mrs. Kenneth Dunwody made a motion that \$10,000.00 of the sum now held on open account be transferred to a savings account so that some interest could be earned. On a second by Mr. Willingham, the motion was unanimously carried.

Mr. Newton reported that he had been in contact with Mr. Thomas H. Hall, III, regarding the appraisal of highway rights-of-way through Baconsfield and Mr. Hall had estimated the cost for such an appraisal would run between \$1,700 and \$2,500. The Board gave its approval for this expenditure. Also, they ratified the \$500.00 gift to the Ocmulgee Little League, the members having given their personal approval of this gift when contacted in March. For the information of the Board, letters of thanks

for this gift were read—one from Dr. John Paul Jones [483] and the other from Dr. Henry H. Tift.

Action on a request from Drs. Jones and Tift for permission to install light poles around the ball diamond so that Little League teams could play at night was postponed until a later meeting.

Mr. Newton then called upon Mr. Gus Sparks, Jr. to present to the Board his law firm's recommended course of action concerning the recent attempt by negro groups to integrate Baconsfield. Mr. Sparks discussed his interpretation of the A. O. Bacon Will and cited points of law involved, as well as court decisions that had been made in similar cases.

After thorough discussion and consideration, the following three resolutions were offered by Mrs. Kenneth Dunwody, seconded by Mrs. Francis K. Hall, and unanimously adopted by the Board, subject to such revision or word change as the firm of Jones, Sparks, Benton & Cork deems advisable and best:

#1. "RESOLVED, that the City of Macon (formerly known as The Mayor and Council of the City of Macon) as Trustee of the Trust established under the Last Will and Testament of A. O. Bacon, deceased, covering property situate in the County of Bibb and City of Macon and known as 'Baconsfield' be requested to resign as such Trustee and to convey all such property, both real and personal which it now holds in such capacity unto the Trustees who shall be appointed by the Judges of the Superior Courts, Macon Circuit, upon proper application by the Board of Managers of Baconsfield; and, in event of a refusal by the City of Macon to comply with said request that Messrs. Jones, Sparks, Benton & Cork, counsel for the Board, be and they are hereby authorized to

take such action as they may deem appropriate to effect such removal.

#2. "RESOLVED, that the new Trustees to be appointed as aforesaid by the Judges of the Superior Courts, Macon Circuit, [484] be three (3) in Number, to-wit, Dr. Henry H. Tift, Emmett G. McKenzie, Jr. and Lawton Miller.

#3. "RESOLVED, that such attorneys be authorized and they are hereby directed to cancel the contract by and between the Board of Managers of Baconsfield and the City of Macon, under which the latter operates that facility known as 'Baconsfield Pool', and that a new contract be negotiated by the Board for the operation of said facility by private parties, either individually or in a partnership or corporate capacity."

There being no further business, the meeting adjourned.

/s/ C. E. NEWTON, JR.

C. E. Newton, Jr., Chairman

/s/ FRANK M. WILLINGHAM

Frank M. Willingham, Secretary

[485]

STATEMENT

BOARD OF MANAGERS OF BACONSFIELD

From April 1, 1962 through March 31, 1963

INCOME RECEIPTS

Rent from Pure Oil Co.	12 months @ \$75.00	\$ 900.00
Rent from Dairy Queen	12 months @ \$116.67 plus additional due on 1961	1,679.93
Rent from Happy Hour Club	12 months @ \$25.00	300.00
Rent from Chas E. Nash	12 months @ \$225.00	2,700.00
		<hr/>
		5,579.93
Balance as of March 31, 1962		12,094.17
		<hr/>
		17,674.10

INCOME DISBURSEMENTS

4-6-62	Luther Williams Son for premium on 137 Emery Highway	\$ 27.90
5-21-62	Gift to Mr. T. C. James as voted by the Board	500.00
7-17-62	Mrs. Kenneth W. Dunwody for purchase of tulip and daffodil bulbs	55.50
9-25-62	Mrs. Kenneth W. Dunwody for purchase of narcissus bulbs from Miss Willie Rice	50.00
9-27-62	Macon Feed & Seed Co. for 600 lbs. rye grass	44.70
	Central Cotton Oil Co. for 3,000 lbs. cotton seed meal	93.75
10-2-62	Evelyn Yater Flower Shop for arrangement sent to home of Mrs. P. L. Hay, Sr.	12.36
10-5-62	W. T. Waeter for 40 loads of dirt	180.00
11-13-62	Benton Rapid Express—express charges from N. Y. to Macon on bulbs from Holland	11.91

11-23-62	Karl Schriff & Associates—Duty and freight on bulbs from Holland to N. Y.	19.71
11-27-62	T. C. James for Christmas Tree	30.00
12-5-62	Oxley-Wynn Co. for Christmas Tree Lights	10.72
12-11-62	G. A. Spence for decorating tree	7.50
	Wm. R. Jones for decorating tree	7.50
	Terry Hitchcock for decorating tree	7.50
2-8-63	Central Ga. Fertilizer Co.— fertilizer	480.00
3-5-63	Ocmulgee Little League—con- tribution authorized by Board Members	500.00
		<hr/>
	Commission @ 5% on rents of \$5,579.93	\$2,039.05
		<hr/>
		279.00
		<hr/>
		2,318.05
	Income Balance as of March 31, 1963	<hr/> \$15,356.05

[488]

February 4, 1964

A call meeting of the Board of Managers of Baconsfield was held in the Directors' Room of The First National Bank and Trust Company in Macon at 11:00 A. M. on February 4, 1964, with Mr. C. E. Newton, Jr., Mr. George P. Rankin, Mrs. Francis K. Hall, Mrs. T. J. Stewart and Mrs. Frederick Williams present. Mr. Frank M. Willingham and Mrs. Kenneth W. Dunwody could not attend. Mr. A. O. B. Sparks, Jr., attended as attorney for the Board.

The Chairman, Mr. C. E. Newton, Jr., called the meeting to order and asked for the reading of the minutes of the meeting held October 29th, 1963. These minutes were approved.

Since this was a call meeting no formal statement of cash receipts and disbursements was presented, but the members were advised of the cash balances on hand.

The highway right-of-way through Baconsfield Park and the Highway Board's offer for that right-of-way was then discussed, together with the appraisal of the land submitted by Mr. Thomas H. Hall, III: Upon motion by Mr. Rankin, seconded by Mrs. Williams, the Highway Board's offer of \$131,000 was unanimously accepted.

At the Chairman's request, Mr. A. O. B. Sparks, Jr. brought the Board up-to-date on what is being done to see that Baconsfield is operated according to the terms of Senator A. O. Bacon's Will, advising them the City of Macon had agreed to resign as Trustee because of its inability to continue to carry out the terms of the trust and further advising that he, on behalf of the Board, would petition the Court for the appointment of individual trustees.

A general discussion followed in which Mr. Sparks answered questions concerning the status of the court proceedings instituted on behalf of the Board.

[489] There being no further business, the meeting adjourned.

/s/ C. E. NEWTON, JR.
C. E. Newton, Jr., Chairman

/s/ MARY D. KEARNES
Mrs. Mary D. Kearnes,
Acting Secretary

[490] BOARD OF MANAGERS OF BACONSFIELD

February 3, 1964

Balance in Checking Account	\$ 2,548.35
Balance in Savings Account	<hr/> 15,248.93
Total	17,797.28

Expenditures since meeting of 10/29/63:

Thomas H. Hall, III—Appraisal of a partial taking Baconsfield by State Highway Department	1,750.00
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[495]

May 21, 1964.

A call meeting, for the purpose of reorganization, of the Board of Managers of Baconsfield was held in the Directors' Room of The First National Bank and Trust Company in Macon at 3:00 P. M. on May 21st, 1964, with Mr. C. E. Newton, Jr., retiring Chairman of the Board, presiding. Other members present were Mrs. Francis K. Hall, Mrs. R. A. McCord, Jr., Mrs. Dan O'Callaghan, Mrs. W. E. Pendleton, Mr. Frank M. Willingham and Mr. A. M. Anderson. Mr. George P. Rankin could not attend due to his absence from the City. Mr. Willis Sparks, III, attended representing the attorneys for the Board.

Mr. Newton called the meeting to order, welcomed the new Board members, and expressed appreciation to Mr. Willingham, Mr. Rankin and Mrs. Hall for continuing their service on the Board.

Minutes of the meeting held April 10th were read and approved, and upon the request of Mr. Newton, Mr. Sparks brought the Board up-to-date on the status of the recent court proceedings, explaining why it was necessary to substitute the names of the new Board for those of the old Board in the Court Petition, and securing the signatures of the members present.

For the benefit of the new members, the statement of receipts and disbursements presented at the April 10th meeting and covering the period from April 1, 1963 through March 31, 1964, was again presented.

Letters of acknowledgment and appreciation were read from Mr. and Mr. T. C. James, from Mr. Harrold L. Kitchens of the Ocmulgee Little League, Mr. Sam Lamback of the Macon Tennis Club and Mrs. George Martin of the Alexander III P.T.A.

Mr. Sparks then explained to the Board various provisions of the present lease between the Board of Managers

and the City of Macon for the operation of the Pool and read to the members [496] a letter his firm had forwarded, under date of May 19, 1964, to the Mayor of the City of Macon advising the City of its breach of the lease under Covenant No. 2, thereof, and pointing out that the letter would serve as a five day notice "within the meaning of the final paragraph of said lease."

Rotation of membership on the Board was discussed and upon motion by Mrs. Hall, seconded by Mr. Willingham, the following rotation plan was adopted:

- (1) The present Board shall serve for a term of five years.
- (2) At the expiration of five years one lady and one man shall be replaced, these two being Mrs. Francis Hall and Mr. George P. Rankin.
- (3) Each two-year period thereafter two present members are to be replaced until the full Board is rotated.
 - (a) First two-year rotation shall be Mr. Frank Willingham and Mrs. R. A. McCord, Jr.
 - (b) Second two-year rotation shall be Mr. A. M. Anderson and Mrs. Dan O'Callaghan.
 - (c) Third two-year rotation shall be Mrs. W. E. Pendleton.
- (4) Persons who have previously served on the Board can be re-elected after an absence from the Board of two years.

The Board referred the matter of a new Agency contract with The First National Bank & Trust Company in Macon to the Board attorneys for approval, and a copy

of the contract is to be submitted to each member before final action.

Upon call for nominations for a new Chairman to serve the Board, Mrs. Hall's nomination of Mr. Frank M. Willingham was seconded by Mrs. McCord and Mr. Willingham was unanimously elected.

Mrs. R. A. Kearnes was elected Secretary to the Board and was also elected to serve as Treasurer until such time as a new Agency contract could be signed with The First National Bank.

[497] Following a discussion of the best methods to maintain the grounds of Baconsfield until a maintenance contract could be negotiated, the meeting adjourned.

/s/ **FRANK M. WILLINGHAM**

Frank M. Willingham, Chairman

/s/ **MRS. R. A. KEARNES**

Mrs. R. A. Kearnes, Secretary

STATEMENT OF ACCOUNTS

[498] BOARD OF MANAGERS OF BACONSFIELD
From April 1, 1964 thru Sept. 30, 1964

CHECKING ACCOUNT

RECEIPTS

Rents:			
Rent from Dairy Queen—6 months @ \$116.67	\$ 700.02		
Rent from Happy Hour Club—6 mos. @ \$25.00	150.00		
Rent from Chas. E. Nash—6 mos. @ \$225.00	<u>1,350.00</u>		
Total Rent Receipts	\$ 2,200.02		
Other:			
6-16-64 Transferred from Savings Account	2,000.00		
8-26-64 Transferred from Savings Account	700.00		
9-14-64 Transferred from Savings Account	1,000.00		
9-24-64 Proceeds from maturity of \$132M U. S. Treas. Bills due 9/24/64	<u>132,000.00</u>		
		135,700.00	
Balance in Checking Account 3/31/64		<u>3,825.78</u>	
		\$141,725.80	

DISBURSEMENTS

4-7-64 Deposit to Savings Account in First Natl.	3,000.00	
4-9-64 Macon Blueprint Co.—copies of Ga. Power Easement	18.12	
4-13-64 T. C. James—Gift	500.00	
5-8-64 Luther Williams' Son—Policy #FF46-25-26 5M—157 Emery Highway	27.90	
6-16-64 Jones, Sparks, Benton & Cork—Legal Fees re: Highway Right-of-Way Condemna- tion Suit	2,000.00	
6-17-64 Thomas H. Hall, III, MAI—Appraisal of Ga. Power Easement thru Baconsfield	40.00	
7-27-64 Cumbie Brothers—Work in Baconsfield thru 7-22-64	1,691.71	
8-28-64 Cumbie Brothers—Work in Baconsfield thru 7-31-64	973.28	
9-14-64 Cumbie Brothers—Work in Baconsfield thru 8-31-64	1,319.08	
9-24-64 The First National Bank & Trust Co. in Macon for Purchase of \$136,000 U. S. Treasury Bills due 7-31-65	<u>131,678.60</u>	
		\$141,248.69
Less: Comm. @ 5% on rents of \$2,200.02	477.11	
Balance in Checking Account 9-30-64	<u>110.00</u>	
	\$ 367.11	

[499]

**STATEMENT OF ACCOUNTS
BOARD OF MANAGERS OF BACONSFIELD
From April 1, 1964 thru Sept. 30, 1964**

SAVINGS ACCOUNT:

Savings Balance 3-31-64	\$15,248.93
Transferred to Savings from Check- ing Account for Investment on 4-7-64	3,000.00
Interest 6-1-64	284.34
	<hr/>
Less: Transfers to checking account to defray expenses:	\$ 18,533.27
6-16-64	2,000.00
8-26-64	700.00
9-14-64	1,000.00
	<hr/>
Total Withdrawals	3,700.00
Savings Balance 9-30-64	\$ 14,833.27

RECAP**Other Investments:**

\$136M U. S. Treasury Bills due 7-31-64 (3.60 basis)	\$131,678.60
Balance in Checking Account 9-30-64	367.11
Balance in Savings Account 9-30-64	14,833.27
Total Cash and Investments 9-30-64	\$146,878.98
	<hr/>

**STATEMENT OF ACCOUNTS
BOARD OF MANAGERS OF BACONSFIELD**

RIGHT-OF-WAY FUND

Received from Sale of Right-of-Way	\$ 132,000.00
Less base of \$132,000.00 U. S. Treasury Bills due 9-24-64	- 129,591.66
	<hr/>
	2,408.34
Interest from maturity of U. S. Treasury Bills due 9-24-64	+ 132,000.00
	<hr/>
	134,408.34
Less base of \$136,000.00 U. S. Treasury Bills due 7-31-65	- 131,678.60
	<hr/>
	2,729.74
Attorney's Fees in connection with Condemnation Suit on Right-of-Way	\$2,000.00
Appraisal Fee to Thomas H. Hall, III, MAI, on Right-of-Way	1,750.00
	<hr/>
	- 3,750.00
Board's Equity in Fund now invested in Treasury Bills as of 9-30-64	1,020.26

RECAP

Board's Equity in Right-of-Way Fund	\$ 1,020.26
Bal. in Checking Account 9-30-64	367.11
Bal. in Savings Account 9-30-64	14,833.27
Cash and Investments Available to Board 9-30-64	<hr/> <hr/> \$ 16,220.64

[505]

February 1, 1966

A joint call meeting of the Board of Managers of Baconsfield and the individual Trustees was held in the Directors' Room of The First National Bank and Trust Company in Macon at 3:00 P. M. on February 1, 1966.

All three Trustees were present together with all Board members except Mrs. W. E. Pendleton, Jr. who could not attend.

Mr. Frank Willingham, Chairman of the Board, was unable to join the meeting until around 3:30 P. M. and until his arrival Mr. Lawton Miller, representing the Trustees, and Mr. A. M. Anderson, representing the Board of Managers, presided jointly.

After an open discussion by the group concerning the course the Trustees and the Board should follow in the light of the recent Supreme Court decision concerning Baconsfield, the following resolution was unanimously adopted:

"BE IT RESOLVED: That the Trustees and the Board of Managers pursue to every reasonable extent the responsibility of operating Baconsfield according to the terms of the Trust established under the Will of Senator A. O. Bacon; and, That if and when it becomes legally impossible to carry out the terms of the Trust, the property should revert to the heirs."

Also, upon motion by Mr. Lawton Miller, seconded by Mr. B. L. Register, the group unanimously voted to ask the Board's attorneys to secure an amendment to the Order of the Superior Court of Bibb County concerning the funds received from the Highway Condemnation proceedings so that the interest earned on these funds can be used by the Board for current expenses.

There being no further business, the meeting adjourned.

/s/ **Mrs. R. A. KEARNES, Secretary**

/s/ **FRANK M. WILLINGHAM, Chairman**

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 1106

E. S. EVANS, ET AL., PETITIONERS,

vs.

CHARLES E. NEWTON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF GEORGIA

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EXCERPTS FROM EXHIBIT "E"

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

To all to whom these presents shall come, Greetings:

I Certify That the attached copy, or each of the specified number of attached copies, of the document(s) identified below is a true copy of a document in the legal custody of the Administrator of General Services and deposited with the National Archives of the United States.

Records of the Works Projects Administration, RG 69, selected pages from Project Folders OP 65-34-1077 through 1096 (some pages unavoidably illegible).

On this day of June 1967,
being duly authorized (41 CFR 101-7.106-3), have
hereunto caused the Seal of the National Archives
to be affixed and my name subscribed by the
Chief, Central Reference Staff

of the National Archives, in the District of Columbia,
this 23rd day of June 1967.

J. H. Bahmer
Archivist of the United States

By

J. H. Bahmer

[598]

12534

TEN'S PROGRESS ADMINISTRATION OF GEORGIA

369

SPONSOR'S FINANCIAL AGREEMENT

348

the Project Covered in Application.

Sponsor's Application No. _____ State Serial No. 31

State Serial No. _____ Official (Adm.) Project No. F3-34-1077

Work Project No. 264

Location: City of Macon City Macon County Richmond

Options: None
(See Presidential Letter Description for Approved Projects)

STATEMENT OF EXPENDITURES TO BE MADE FROM FEDERAL FUNDS OR THE PROPOSAL
STATED HEREIN IS, THE UNDERSIGNED LEGALLY AUTHORIZED REPRESENTATIVES OF THE
SPO, DO HEREBY AGREE THAT WE WILL FINANCE SUCH PART OF THE ENTIRE COST THEREOF
AS MAY NOT BE SUPPLIED FROM FEDERAL FUNDS.

Al Officer R. H. Casner Title President Date 7/28/37
S. Secretary W. H. Casner Title Vice President Date 7/28/37
Sponsor's Agent C. C. Casner Title Manager Date 7/28/37

349

12595

5370

**WOLF PROJECTS ADMINISTRATION
OF 1932.**

(Use this form only for Official Projects)
(Approved for local operation)
CERTIFICATE OF WHETHER OR NOT PROJECT BALANCE AVAILABLE
FOR EXPENDITURE

TO: STATE OFFICE Division of Operations & Division of Women's Work **(Check)**

W.P. AREA NO. 8 COUNTY KODA
C.O.P. OR A.P. NO. 55-24-1077 W.P. NO. 244

**Presidential or
Administrative
Letter Numbers**

A rectangular label with the text "REGIONAL OFFICE NOTIFIED JUL 7 1939" and a postage stamp.

ACTUAL EXPENDITURES AS OF		19	ACTUAL EXPENDITURES		
ACTUAL M/S ECTS	PERIOD	ACTUAL	ESTIMATED EXPENDITURE	PERIOD	ACTUAL
469029	—	1126513.9	8265.07	1126513.9	1126513.9
—	—	396.46	1416.01	400.91	17
469029	—	1222223.5	1222223.5	1222223.5	1222223.5

- (1) Presidential Limitation including all supplements (exclusive of 10% authorized increase).
 - (2) Total W.P.L. Expenditures
 - (3) Encumbered balance of W.P.L. Limitation available for rescission (1 minus 2)

This certifies that the statement above represents the true financial condition of the above identified project as of the date shown and that the unencumbered balance shown is available for reissuance, and that no unliquidated encumbrances are outstanding against the project. It is certified that total expenditures of Federal funds are within the authorized limitation for the project. It is also certified that Federal expenditures for labor represent not less than 25% of total Federal expenditures on the project. This further certifies that no additional encumbrances will be accepted which will alter the total Federal expenditures on the project.

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**State Director of Finance
Bank Projects Administration**

351

614 5388 WORK PROGRESS ADMINISTRATION
PROJECT APPLICATION

and reported by Director of Works _____ State Serial No. _____
 and approved by State _____ W.P.A. Work Project No. 00000 _____
 115-6 1935 *May 13, 1935* (Date Approved) STATE OF GEORGIA
 Approved _____ Director of Work Progress Administration

Work Progress Administration of _____ Georgia (State)
 A public has been made of Director's Project Report No. _____ submitted to
 _____ (City) _____ (Town, Village) _____ (County)
 for location, description and character of work). Involving city park and
 services of Park Department.

Shows from this analysis that the following results will be obtained:
 Number of months of work _____ Total manpower of work _____
 Average of workers per month _____
 (a) Persons from public relief rolls, paid from Federal funds _____
 (b) Total persons paid from Federal funds _____
 (c) Total persons paid by States _____
 (d) Total number of workers (b plus c) _____
 Total of money, number of workers from relief rolls to all persons _____
 paid from Federal funds (as divided by ab above) _____
 Paid by other agencies per employee of labor _____
 Project can be started _____ days after notice of approval and will require 11 months
 for completion.
 Land, labor, equipment and materials of land suitable for park development
 and take control of project 11 months will be required to complete the work.

Item of estimated cost:	1	2	3	4	5
Land					
Appropriations	4,734	0			
World, equipment and other Costs					
TOTAL COST OF PROJECT	109,524	123	3200	000	1/27/35

The proposed project complies with the requirements of the Work Progress Administration,
 no application for alteration of funds is hereby made.

What is to be Taken, *Wells Mullin* Date *8/3/35*
 What is to be Disbursed, *Frank C. Erhart* Date *8/31/35*
 What is to be _____ Date *8/24/35*
Ch. 135: *Signature* *Ch. 135:* *Signature*

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[650]

EXHIBIT "F"**Deed Book 248 11****STATE OF GEORGIA, COUNTY OF BIBB.**

THIS INDENTURE, Made and entered into this the 4th day of February, 1920, between Richard C. Jordan, Samuel B. Hunter, Custis Nottingham, as Trustees of the estate of Augustus Octavius Bacon, parties of the first part, and the city of Macon, party of the second part

WITNESSETH: That the said parties of the first part, in consideration of the devise to the Mayor and Council of the city of Macon, contained in the Will of Augustus Octavius Bacon, of solemn probate in the court of Ordinary of Bibb County, Georgia, and in consideration of the assent of all heirs and legatees of said estate, as evidenced by their writing under date of January —, 1920 hereto annexed and made a part of this conveyance, and in further consideration of the covenants of The City of Macon to pay as a charge against said lands the sum of One Thousand six hundred and sixty five (\$1665.00) Dollars, payable annually on the 4th day of February of each year to grantors herein named during the natural life of Mary Lou Bacon Sparks, said charge to cease and terminate upon the death of the said Mrs. Mary Lou Bacon Sparks, and in further consideration of the agreement on the part of The City of Macon that no taxes or other assessments which may accrue after this date against the property herein conveyed shall be a charge against the other property of said estate;

The Trustees do, for the consideration aforesaid, hereby sell, convey and deliver unto the said The City of Macon, its successors, a

All that tract or parcel of land lying and being in the county of Bibb, State of Georgia, containing one hundred the hundred and seventeen and seven-tenths (117.7) acres, more or less, and being just on the East side of the Ocmulgee River, near the Spring Street Bridge, said property lying on both sides of the public road or street, known as Boulevard, Baconsfield and [651] being more particularly described in Item Nine of the Will of Augustus Octavius Bacon, of solemn probate and record in The Court of Bibb County, Georgia,

Which description is hereby referred to and incorporated as a part of this conveyance, and being more fully shown by plat of said tract attached to said Will, and recorded in Book F, Folio 354, in the Ordinary's Office of Bibb County, and a copy of which plat is hereto attached, and made a part of this deed. These references to said Will and Plats are made for the purposes of a more complete description.

And the said parties of the first part, in consideration of said foregoing stipulations and of the provisions of said Will, do hereby convey to The City of Macon the following personal property, to-wit:

Ten (10) Bonds, Nos. 584 to 593 inclusive, of the Macon Railway & Light Company, each in the sum of One Thousand (\$1,000.00) Dollars, and bearing interest at the rate of five (5) per cent, annually, payable semi-annually, each of said Bonds having attached thereto all coupons unmatured, and the following matures coupons; coupons due in the month of July, 1919, and coupons due in the month of January, 1920, and twenty five hundred (\$2500.00) Dollars in cash, the avails of said Bonds, accrued interest since death of the said Augustus Octavius Bacon, collected by the said Trustees.

IN CONSIDERATION of which the said The City of Macon
agrees to appropriate Six Hundred and fifty (\$650.00)
Dollars annually for the improvement of said Park, said
sum being five (5) per cent. on the aggregate of Thirteen
Thousand (\$13,000.00) Dollars thus covered into her Treas-
ury.

IN WITNESS WHEREOF the said parties of the first part,
as Trustees of the estate of Augustus Octavius Bacon,
have hereunto set their hands and affixed their seals the
day and year first above written.

[652] Signed, sealed and de- Samuel B. Hunter (L.S.)
livered in the presence of: R. C. Jordan (L.S.)

A. Ethridge Custis Nottingham (L.S.)
Julia E. Greene, Notary As Trustees under last Will
Public, Bibb County, Ga. and Testament of Augustus
Octavius Bacon.

(For Plat see Book 83, Folio 248)

(Recorded Feb. 10, 1920)

EXHIBIT "F"

STATE OF GEORGIA, COUNTY OF BIBB
CLERK'S OFFICE, BIBB SUPERIOR COURT.

I, James Murphy, Dep. Clerk of the Superior Court, a court of record in and for said County, do hereby certify that the foregoing 1 page contains a true and correct copy of Deed from Trustees of the estate of Augustus Octavius Bacon to City of Macon as recorded in Deed Book 248, Page 11 as the same appears of file and record in said Clerk's Office.

Witness my official signature and the seal of said Court, this 2nd day of February, 1967.

/s/ JAMES MURPHY,
Dep. Clerk, Superior Court
Bibb County, Georgia

(Superior Court Bibb County, Georgia)
(Seal)

[653]

EXHIBIT "G"

Deed Book 248, Page 16

GEORGIA, BIBB COUNTY.

THIS INDENTURE, Made and executed this 4th day of February, 1920, between Custis Nottingham, party of the first part, and the City of Macon, party of the second part;

WITNESSETH: That the said Custis Nottingham is consideration of the sum of Five Thousand, one hundred (\$5,100.00) Dollars, to him this day cash in hand paid by the City of Macon the same being the present cash value of his occupancy of the dwelling house in the Park at Baconsfield, and in consideration of the City of Macon taking over all of said Baconsfield as a Park, and same being fully described in conveyance from Richard C. Jordan, et al., Trustees to the city of Macon, of even date herewith, does remise, release and forever QUIT CLAIM to the said the City of Macon all right, title, interest and equity he has in the premises so occupied by him under Item Four (4) of the Codicil to the Will of Augustus Octavius Bacon, of solemn probate and record in the office of Ordinary of Bibb County, Georgia.

It being Agreed and understood by and between the parties hereto that the said sum of Five Thousand, One Hundred (\$5,100.00) Dollars represents the present cash value of the interest of the said Custis Nottingham in the property and premises herein described and conveyed, being based on the right of occupancy of the said Custis Nottingham to said premises under the terms and conditions of the Will of the late Augustus Octavius Bacon,

deceased; said expectancy being for a term of sixteen (16) years.

And it is further agreed and understood that in the event the possession of the property this day conveyed to the said City of Macon by R. C. Jordan, et al., Trustees, is ever retaken by the said Trustees, or their successors, then, and in that event the said Custis Nottingham agrees to accept from the said city of Macon a surrender of the premises herein conveyed to it and to return to the City of Macon the unearned portion of said Five Thousand, One Hundred (\$5,100.00) Dollars, [654] based upon a sixteen (16) year expectancy.

The premises above referred to are the same occupied at the date of the execution of said will by the said Custis Nottingham and his family, and now occupied by them.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.
Signed, sealed and delivered in the presence of:

H. Rudisill

Custis Nottingham (L.S.)

Julia E. Greene, Notary Public,
Bibb County Georgia.

(\$5.50 Revenue stamps cancelled)

(Recorded Feb. 13, 1920)

EXHIBIT "G"

**STATE OF GEORGIA, COUNTY OF BIBB
CLERK'S OFFICE, BIBB SUPERIOR COURT.**

I, James Murphy, Dep. Clerk of the Superior Court, a court of record in and for said County, do hereby certify that the foregoing 1 page contains a true and correct copy of Deed from Custis Nottingham to the City of Macon as recorded in Deed Book 248, Page 16 as the same appears of file and record in said Clerk's Office.

Witness my official signature and the seal of said Court, this 27th day of April, 1967.

/s/ **JAMES MURPHY**
Dep. Clerk, Superior Court
Bibb County, Georgia

(Superior Court Bibb County, Georgia Seal)

[662]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

AMENDMENT TO MOTION FOR SUMMARY JUDGMENT
—Filed June 29, 1967

Come now GUYTON G. ABNEY, J. D. CRUMP, T. I. DENMARK and Dr. W. G. LEE as Successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, and tender this amendment to their motion for summary judgment as previously filed:

1.

Movants tender this amendment in order to reflect that their motion is based upon certain additional evidence by way of affidavits and aerial photographs and a swimming pool lease attached hereto.

2.

Specifically the additional evidence attached hereto consists of the following:

- (1) An envelope marked "Exhibit A" containing seven aerial photographs of the Baconsfield area numbered "1" through "7" on their reverse side and initiated by Frank M. Willingham.
- (2) An affidavit of Frank M. Willingham, Chairman of the Board of Managers of Baconsfield, identifying the contents of each of the seven photographs by number and also identifying a lease of Baconsfield Pool, hereto as "Exhibit B".

- (3) An affidavit of Ralph B. Jones, a commercial photographer, who took the aerial photographs and who identifies them, attached [663] as "Exhibit C".
- (4) A lease of Baconsfield Pool from the Board of Managers of Baconsfield to the City of Macon dated December 21, 1948 bearing the original signatures of officials of those two bodies, this lease being attached as "Exhibit D".

WHEREFORE, movants pray that this amendment with its accompanying exhibits be allowed and ordered filed of record.

/s/ JONES, SPARKS, BENTON & CORK
JONES, SPARKS, BENTON & CORK
Attorneys for Movants

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[664]

EXHIBIT A

(See Opposite) ~~ESF~~

364

[665]

(See Opposite) ➤

366

[666]

(See Opposite) 

368

[667]

(See Opposite) 

370

[668]

(See Opposite) 

372

[669]

(See Opposite) 

374

[670]

(See Opposite) ~~EF~~

[671]

EXHIBIT "B"
THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

**AFFIDAVIT IN SUPPORT OF MOTIONS FOR SUMMARY
JUDGMENT OF THE HEIRS OF SENATOR A. O. BACON
AND GUYTON ABNEY ET AL. AS SUCCESSOR TRUSTEES
UNDER BACON'S WILL**

I am Frank M. Willingham. I live on Oakcliff Road in Macon, Georgia and am President of Willingham Cotton Mills in Macon. I have served continuously as a member of the Board of Managers of Baconsfield since about 1954. I was elected Chairman of the Board of Managers of Baconsfield at a meeting on May 21, 1964 to fill that position upon the resignation of former Chairman Charles E. Newton.

The purpose of this affidavit is to explain the contents of seven aerial photographs of the Baconsfield area which I understand are to be placed in evidence by Attorneys for the heirs of Senator Bacon and trustees for certain other of his heirs. I am familiar with the entire Baconsfield area because of my connection with the Board of Managers of Baconsfield. In each of the seven aerial photographs I am able to recognize without difficulty all or a portion of the Baconsfield area. These photographs taken from different angles seem to include the entire park area as well as to show that part of Baconsfield which Senator Bacon left as income producing property.

I am informed the photographs were taken by Mr. Ralph B. Jones of Drinon, Inc. on June 16, 1967, and information stamped on the reverse side of these prints so indicates.

The seven photographs have been numbered "1" through "7" in ink on their reverse sides, and I have placed my initials beside the said numbers on each print.

I will now give some description of what is seen in each of the seven photographs.

[672] Photograph numbered "1" is a view looking in a generally southeasterly direction. About one inch up from the bottom of the print and very near the center of the print is an intersection of two streets. The street which runs from that point up and to the left reaching the left margin of the print at a point approximately six inches up from the bottom of the same is Nottingham Drive. This street forms what may generally be described as the northeastern boundary of the park area. The street which runs at right angles to Nottingham Drive from the aforementioned intersection toward the right hand margin of the print is Parkview Drive. It forms the northwestern boundary of the park area. The street which comes into view six inches up the left margin of the print and which goes out across the bridge nearest the center of the photograph into the city is known as North Avenue or Spring Street. It forms the southeastern boundary of the park area. Southeast of that street may be seen a cluster of buildings some of which comprise the Baconsfield Shopping Center, which has produced income over the years for the upkeep of Baconsfield. Beyond these buildings may be observed another street known as Emory Highway. There is additional property left by Senator Bacon for the purpose of raising income for his park beyond Emory Highway i. e. southeast of it.

Three inches from the left end of the paper and two and an eighth inches down from the top of the paper one may observe the entrance from North Avenue of a paved street into the Park which is known as Lee Boulevard. This street

may be observed proceeding in a northwesterly direction parallel to Nottingham Drive and then curving sharply to the northeast and then dividing in two as it enters Nottingham Drive leaving a triangular section of grass. The center of this triangle of grass is two inches from the left end of the paper and four and a quarter inches from the bottom of the paper.

[673] Just northwest of where Lee Boulevard comes into Nottingham Drive there may be observed another road running off of Nottingham Drive into the park area in the lower foreground and coming across to dead end in Parkview Drive. This is an unpaved dirt road.

Two other roads running through the park from Lee Boulevard over to Parkview Drive appear. They are paved.

The double ribbon of concrete entering the picture from the right margin at a point approximately three and one-half inches up from the bottom of the paper is newly opened Interstate Highway 16. Since Bacon's grant for the park extended in a southwesterly direction to the Ocmulgee River, this Highway runs across land given in that devise. It was acquired by condemnation. However, before the construction of Interstate Highway 16 the area which has now been raised to underlie the Highway was frequently inundated by floodings of the Ocmulgee River so that the developed part of the park never extended as far toward the River at the present position of Interstate 16.

Photograph numbered "2" is taken from practically the same direction as photograph numbered "1" already discussed.

Photograph numbered "3" is a view of the park area looking in a generally southwesterly direction. Nottingham Drive forming the northeastern boundary of the park may be observed running across the print about two and one

quarter inches from the bottom of the paper. Beyond it may be viewed in succession the Park, Interstate Highway 16, the Ocmulgee River and the City of Macon.

Photograph numbered "4" is a view looking in a generally northeasterly direction. The Ocmulgee River and Interstate Highway 16 may be viewed in the foreground. The street running vertically along the lower left hand of the print about one half inch from the end of the paper is Parkview Drive previously referred to as the northwestern boundary of Baconsfield Park.

[674] Photograph numbered "5" is a view from the southeast. The prominent road down the left hand side of the print is Interstate Highway 16. The structure in the park rather well centered in the photograph and about two and one half inches up from the bottom of the paper is the building known as the Woman's Club. The street passing under Interstate Highway 16 at the lower left corner of the print is North Avenue or Spring Street. The street intersecting Spring Street at about the middle of the print and one and one-quarter inches up from the bottom of the paper and running diagonally out of sight at the bottom right hand corner of the print is the Emory Highway. Bacon's commercial area lies east or southeast of Spring Street. The Baconsfield Shopping Center leased by the Board of Managers to provide an income for the upkeep of the park lies in a triangular area between Spring Street and the Emory Highway. Other parts of Bacon's commercial property lie to the far side of Emory Highway from the park and some portion of that property is shown in the lower foreground in photograph "5".

The entire area in photograph "5" lying between Spring Street and the Emory Highway is not a part of the Baconsfield Shopping Center. Rather the broad alley in the lower

right hand corner of the picture approximately two and three quarter inches from the right hand border of the paper and running parallel with it separates Bacon's income producing property on the left from another unrelated shopping center to the right of that alley.

Photograph "6" is a view toward the west. The Baconsfield Shopping Center leased by the Board of Managers appears in the lower left hand corner in a triangular shape. In the lower left corner there is discernible a sign reading "Piggly Wiggly". The alley just beyond that sign serves as a division between Bacon's triangular shopping center and a similar project nearer the left hand bottom of the picture.

[675] Finally photograph numbered "7" shows a view of property lying southeast of North Avenue. In the center of the photograph and approximately three and three quarter inches from the bottom of the paper are the remnants of Baconsfield Swimming Pool. This pool is located upon what Bacon had designated as a portion of that property to raise income to support his park. The circular roadway passing in close proximity to the ruins of the pool is a ramp to Interstate Highway 16.

A five page lease of this pool from the Board of Managers of Baconsfield to the City of Macon dated December 21, 1948 was operative until May of 1964 when it was cancelled. I have placed my initials on the top of the first page thereof to identify it as the one I refer to and of which I have personal knowledge. During the spring of 1964 the ramp to Interstate Highway 16 was under construction, and heavy road machinery was operating in close vicinity to the pool. The pool was not opened in the summer of 1964 and has not been opened since then.

I have read this five page affidavit in its entirety and it is true and correct in every respect and, if need be, I could and would swear under oath to the truth of its contents in open court.

/s/ **FRANK M. WILLINGHAM**
Frank M. Willingham

Personally appeared before me, the undersigned, an officer duly authorized to administer oaths, Frank M. Willingham, who having been placed under oath has sworn that the contents of the foregoing affidavit are true and correct in every respect.

This 28 day of June, 1967.

/s/ **H. V. LAMON (N. P. Seal)**
Notary Public Residing in
Bibb County, Georgia

[676]

EXHIBIT "C"**THE SUPERIOR COURT OF BIBB COUNTY****[Title Omitted]****AFFIDAVIT IN SUPPORT OF MOTIONS FOR SUMMARY
JUDGMENT OF THE HEIRS OF SENATOR A. O. BACON
AND GUYTON ABNEY ET AL. AS SUCCESSOR TRUSTEES
UNDER BACON'S WILL**

I am Ralph B. Jones. I am now and have been for thirty-five years a professional photographer. For nineteen years I have been associated with Drinnon, Inc., a corporation engaged in the business of photographs and photographic engravings with a place of business at 481 Broadway in Macon, Georgia. I am presently Vice President of Drinnon, Inc. and manager in charge of photography.

During June, 1967, I was requested by Willis B. Sparks, III, (whom I understand to be one of several attorneys representing the heirs of Senator Bacon and the trustees for certain other heirs) to take a series of aerial photographs of Baconsfield including Baconsfield Park and that area which Senator Bacon devised as income producing property for the maintenance of Baconsfield Park. Mr. Sparks requested that I take pictures from various angles in order that all areas of Baconsfield might be observed in one or more of the pictures.

In accordance with his request on June 16, 1967, I took several aerial photographs, from different angles all from an elevation of approximately 1,000 feet. The pictures were taken with a 4 x 5 (film size) Super-Graphic camera. Exposures were made at 1/500 of a second shutter speed with a diaphragm opening of F.11. Also a K-2 haze filter was used.

From un-retouched negatives a series of prints was made at Drinnon, Inc. and on the back of each print appears the following language which serves to identify the photographs as the ones taken as above described:

[677] "Drinnon, Inc.
By Ralph Jones
481 Broadway
Macon, Georgia" "June 16, 1967"

It is my understanding that this affidavit and the photographs hereby identified are to be placed in evidence in the Superior Court of Bibb County, Georgia as a part of further proceedings in the above captioned case.

I could and would, if it were necessary, freely testify under oath in open court to the truth of the facts contained in this affidavit.

I have read this two page affidavit in its entirety and it is true and correct in every respect.

/s/ RALPH B. JONES
Ralph B. Jones

Personally appeared before me, the undersigned, an officer duly authorized to administer oaths, Ralph B. Jones, who having been placed under oath has sworn that the contents of the foregoing affidavit are true and correct in every respect.

This 6 day of June, 1967.

/s/ EARL (Illegible) (N. P. Seal)
Notary Public Residing in
Bibb County, Georgia.

[678]

EXHIBIT "D"

GEORGIA, BIBB COUNTY

THIS CONTRACT made and entered into this the 21 day of Dec., 1948, between the BOARD OF MANAGERS OF BACONSFIELD, hereinafter sometimes referred to as the "BOARD", the first party, and the CITY OF MACON, a Georgia municipal corporation, hereinafter sometimes referred to as "THE CITY", the second party;

WITNESSETH:

That in consideration of the improvements now being made by THE CITY upon the swimming pool in Baconsfield, and of the improvements which THE CITY will hereafter make thereon, and of the other covenants and agreements of THE CITY as hereinafter set out, the BOARD hereby leases and grants unto THE CITY, upon the terms and conditions hereinafter set forth and for the period of time designated, the following described real estate, to-wit:

DESCRIPTION OF PROPERTY:

All that tract or parcel of land situate and being in the East Macon District of Bibb County, Georgia, and in that portion of the tract of land known as Baconsfield, devised to the City of Macon as Trustee, by A. O. Bacon in his last will and testament, lying easterly of Boulevard Baconsfield and also easterly of Emory Drive, upon which is located the swimming pool and adjacent buildings, recently constructed upon such portion of Baconsfield, and known as Baconsfield Pool. The tract of land herein specifically demised is more fully shown upon a plat hereto attached and made a part of this contract and designated thereon as "Swimming Pool Area", to which plat reference is made for

the purpose of a more complete and accurate description.

[679] TERM OF LEASE:

This lease shall commence as of the first day of April, 1948, and terminate at midnight of March 31st, 1950.

If the City is not in default hereunder, then this lease shall automatically be renewed, in accordance with all of its terms and provisions, for similar successive terms of two years; provided that either party may terminate this renewal provision, during either the designated term or any [680] succeeding term, by serving written notice upon the other at least six months prior to the termination date of the then current term, of its desire to terminate such provision, in which event the contract shall be of no further force or effect after the termination date of such current term.

The foregoing provisions shall not be construed as affecting in any way the right of the BOARD, upon the breach by the City of any of its covenants, to terminate either the original term or any succeeding term, as hereinafter provided.

USE OF PREMISES:

Said premises are to be used by THE CITY exclusively for the operation of the said swimming pool, as a part of the pleasure and recreational facilities of Baconsfield, for the enjoyment and benefit of the beneficiaries of the trust for Baconsfield, as set up and established in the said last will and testament of the said A. O. Bacon, deceased, and also for other persons who are or may be admitted to Baconsfield.

THE OPERATION OF THE SWIMMING POOL:

THE CITY shall conduct the said swimming pool, through such agents and servants, and in such manner and for such periods of time during the term of this lease as within its discretion is deemed appropriate, subject only to the powers of the Board of Managers of Baconsfield, as set forth in the Ninth Item of the said will of A. O. Bacon, and most particularly subject to the "restrictions, government, management, rules and control of the Board of Managers", and to such regulations and rules for the use and enjoyment of Baconsfield as said BOARD may adopt and make applicable to all of Baconsfield.

RENTAL:

It is understood and agreed that THE CITY shall make charges to those who use the swimming pool and the swimming pool area as it desires, such charges being made for the purpose of [681] carrying on a successful operation of such swimming pool.

It is further agreed that in the conduct of such operation, the rental which the BOARD obtained from Johnny Smith, of Bibb County, Georgia, under and by virtue of the contract entered into between the BOARD and Johnny Smith, a copy of which is hereto attached, together with any rental or remuneration which the BOARD may receive by virtue of any other concession or lease which it may grant or make to any other person, in the event the within contract with Johnny Smith is terminated prior to the end of the term thereby granted, shall be pooled with the income obtained by THE CITY from the operation of the swimming pool and the swimming pool area, and after the deduction of the expense of the operation, the balance remaining, if any, shall then be divided equally between THE CITY and the BOARD.

In the event that there is any loss resulting from the operation of the said swimming pool and swimming pool area, by THE CITY, such loss shall be borne by THE CITY, so that in no event shall the BOARD be required to contribute to such operation anything other than the net rental or net income from the concessions and leases above referred to.

Covenants of the City:

THE CITY covenants and agrees with the Board:

- (1) That it will open the said swimming pool as soon as it has been completed and operate the same during seasonable weather throughout the balance of the term of this lease.
- (2) That it will comply with the provisions of the said Trust for Baconsfield and with such restrictions, rules and regulations for the use and enjoyment of Baconsfield, as the BOARD may from time to time, adopt and make applicable to all of Baconsfield.
- (3) That it will make no sub-lease nor grant any [682] concession for the sale of any article or the operation of any amusement device upon the demised premises, or otherwise in connection with the operation of the swimming pool, nor permit any act to be done or performed which will adversely affect the rights of the lessee in the attached contract, or the rights of the BOARD with respect to the granting of any subsequent lease upon or concession in that area shown upon said plat and designated as "Refreshment Concession", nor with the grant of any concession by the BOARD upon any portion of Baconsfield which lies east of Boulevard Baconsfield and Emory Highway.

- (4) That it will on or before December 1st of each year during the term of this lease, furnish THE BOARD with an

accounting of all receipts and disbursements for the period terminating with September 30th of such year.

In the event that it breaches any of its covenants, numbered 1 to 4, inclusive, and fails to correct such breach within five days after written notice thereof, to the Mayor of the City of Macon, then the BOARD shall have the right to immediately terminate this contract, assume possession and control and management of the swimming pool and the swimming pool area, in which event all rights of THE CITY hereunder, except such rights as it may have with regard to the net revenue earned to the date of such termination, shall cease and determine.

IN WITNESS WHEREOF, the parties hereto, acting by and [683] through their respective duly authorized officers, have hereunto set their hands and affixed their seals the day and year first above written.

BOARD OF MANAGERS OF BACONSFIELD

/s/ DR. W. G. LEE

Chairman

Attest: / C. E. NEWTON, JR.

Secretary

THE CITY OF MACON

/s/ (Illegible) B. WILSON

Mayor

/s/ VIOLA ROSS NAPIER

City Clerk

(CITY OF MACON SEAL)

[686]

CERTIFIED COPY OF EXCERPT FROM RESOLUTION OF MAYOR AND
COUNCIL OF CITY OF MACON ADOPTED JULY 22, 1947

Filed June 29, 1967.

[EMBLEM]

CITY HALL
CITY OF MACON
GEORGIA

June 27, 1967.

Now, THEREFORE, BE IT RESOLVED, that the Treasurer of the City of Macon immediately deliver to the Board of Managers of Baconsfield, either in cash or in securities, or in both cash and securities, the said fund of One Hundred Thousand (\$100,000.00) the same to be held by the Board of Managers of Baconsfield in separate fund and used by such Board solely for the construction of said pool, with its adjacent buildings and accessories.

I do hereby certify the above is a true and correct excerpt from Resolution of Mayor and Council of the City of Macon adopted July 22, 1947.

Witness my hand and seal of the City of Macon this 27th day of June, 1967.

/s/ ALEX B. CAMERON
Alex B. Cameron,
Clerk of Council.

(CITY OF MACON SEAL)

In addition \$40,000.00 was appropriated by Mayor and Council by ordinance adopted December 23, 1947 for the year 1948 for the Recreation Department to construct bath houses.

FILED IN OFFICE
29th day of June, 1967

/s/ LILLIAN LAVINE
Deputy Clerk

[687]

IN THE SUPERIOR COURT OF BIBB COUNTY

[Title Omitted]

ORDER MAKING ATTORNEY GENERAL A PARTY TO CASE
—Filed July 21, 1967

The above captioned case having come back to this Court on remand from the Supreme Court of Georgia for further proceedings and a hearing having been held on June 29, 1967, on a motion for summary judgment filed on behalf of the heirs of the late Senator A. O. Bacon and counsel for the heirs, for the intervenors E. S. Evans, et al., for the Board of Managers of Baconsfield and successor trustees in lieu of the City of Macon formerly appointed by this Court and for the City of Macon all being present and all having been heard in open Court and it being made to appear that the Attorney General of Georgia, Honorable Arthur K. Bolton should be made a party to this case pursuant to Georgia Code Section 108-212 (Acts 1952, pp. 121, 122; 1962, p. 527);

IT IS THEREFORE NOW ORDERED AND ADJUDGED that the Attorney General of Georgia in his official capacity is by this ORDER made a party to this case. Let a copy of this ORDER together with copies of the following materials be forthwith served upon the Attorney General:

- [688] (1) A Xerox copy of the record in the case of *Evans v. Newton* as it was printed for the Supreme Court of the United States (including therein the decision of the Georgia Supreme Court sought to be reviewed).
- (2) A copy of the motion for summary judgment by Guyton Abney, et al. as successor trustees under the Will of A. O. Bacon and an Order

of Bibb Superior Court dated November 10, 1966, allowing it to be filed of record.

- (3) A copy of a document entitled, "Response to Motion for Summary Judgment filed by Successor Trustees under Will of Augustus Octavius Bacon," such document being filed on behalf of Rev. E. S. Evans, et al., intervenors with a certificate of service dated January 12, 1967, and signed by Attorney William H. Alexander.
 - (4) An unheaded document with a certificate of service dated January 16, 1967, signed by Attorney George C. Grant, filed as a response by the successor trustees in lieu of the City and the Board of Managers of Baconsfield to the motion for summary judgment.
 - (5) A document entitled, "Response to Motion for Summary Judgment filed by successor trustees under Will of Augustus Octavius Bacon," such document being filed on behalf of Willis B. Sparks, Jr. and others as the "Sparks heirs" of Senator Bacon. This document bears a certificate of service signed as of January 13, 1967.
- [689] (6) A 36-page copy of the record of the hearing in Bibb Superior Court before Judge Oscar L. Long held on June 29, 1967.

IT IS HEREBY ORDERED that said Attorney General shall have 30 days from receipt by him of these materials and a copy of this ORDER in which to make any written response by way of pleadings as he shall deem appropriate. He may make application to this Court within the 30 day period for an extension of time if he should deem it necessary or appropriate to do so.

It is contemplated that counsel for one or more of the parties will confer with the Attorney General or some attorney on his staff as to the nature of these proceedings, the Attorney General being a newcomer to a rather lengthy case with a voluminous record.

[690] Counsel for the heirs of Senator A. O. Bacon are hereby DIRECTED to make available to the Attorney General such copies of such materials as he after consideration feels he would wish to have for his consideration. Of course, any counsel representing any party to the case may provide the Attorney General with copies of any parts of the record he feels the Attorney General should have at his disposal.

There shall be no future oral hearing or argument unless one shall be expressly requested of this Court by the Attorney General or some assistant acting on his behalf within 30 days of the receipt by him of the ORDER of this Court making him a party to the case.

Let the Attorney General of Georgia sign an acknowledgment of service of this ORDER and accompanying materials as specified herein and immediately transmit it to the Clerk of Bibb Superior Court so that it may be filed of record. Let a copy of this ORDER be served upon all counsel of record in this proceeding.

IT IS SO ORDERED this 21st day of July, 1967.

/s/ O. L. LONG
O. L. LONG
J.S.C.M.C.

/s/ LILLIAN LAVINE
Deputy Clerk

FILED IN OFFICE
21st day of July, 1967

[695]

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

[Title Omitted]

INTERVENORS' SECOND SUPPLEMENTAL RESPONSE TO MOTION
FOR SUMMARY JUDGMENT FILED BY SUCCESSOR TRUSTEES
UNDER THE WILL OF A. O. BACON—Filed June 29, 1967

Come now, Rev. E. S. EVANS, LOUIS H. WYNNE, Rev. J. L. KEY, Rev. BOOKER W. CHAMBERS, WILLIAM RANDALL and Rev. VAN J. MALONE, intervenors, who file this Second Supplemental Response to the Motion for Summary Judgment filed by the successor trustees under the will of A. O. Bacon, and show the Court the following:

—1—

That attached hereto and incorporated herein by reference, are the following exhibits:

- (a) Exhibit J—Affidavit of William H. Alexander, attorney for intervenors.
- (b) Exhibit K—Certified copy of records of the Work Projects Administration, Record Group 69, Microfilmed Project Folders, Georgia: Selected Documents from the Project Folder Relation to Official Project 665-34-2-164 (Roll 236-W).
- (c) Exhibit L—Certified copy of records of the Work Projects Administration, Record Group 69, Selected pages from the Microfilmed Project Ledgers for Georgia relating to Official Project 665-34-2-164 (Roll 69W).
- [696] (d) Exhibit M—Certified copy of records of Work Projects Administration, Record Group 69, Microfilmed Project Folders, Georgia: Selected Documents from the

Project Folder relating to Official Project 65-1-34-52 (Roll 2990W).

(e) Exhibit N—Certified copy of records of Work Project Administration, Record Group 69, Selected pages from Microfilmed Project Ledgers for Georgia relating to Official Project 65-1-34-52 (Roll 71W).

(f) Exhibit O—Certified copy of excerpt from minutes of the City Council of the City of Macon dated February 3, 1920.

(g) Exhibit P—Certified copy of excerpts from minutes of the City Council of the City of Macon dated February 17, 1920.

(h) Exhibit Q—Certified copy of excerpt from minutes of the City Council of the City of Macon dated July 21, 1936.

(i) Exhibit R—Certified copy of excerpt from minutes of the City Council of the City of Macon dated June 21, 1938.

(j) Exhibit S—Certified copy of excerpt from minutes of the City Council of the City of Macon, constituting the City Budget for 1939, dated January 10, 1939, page 30.

(k) Exhibit T—Certified copy of excerpt from minutes of the City Council of the City of Macon, constituting the City Budget for 1939, dated January 10, 1939, page 31.

(l) Exhibit U—Certified copy of excerpts from minutes of the City Council of the City of Macon, constituting the City Budget for 1940, dated December 26, 1939, page 199.

[697] (m) Exhibit V—Certified copy of excerpt from minutes of the City Council of the City of Macon dated July 15, 1947.

—2—

A certificate of the Clerk of the City Council of the City of Macon dated June 27, 1967, and pertaining to resolutions of the City Council of July 22, 1947, and December 23, 1947, was offered into evidence and admitted without objection in open court at the hearing in this case on June 29, 1967. (See transcript of hearing page 31.) For purposes of the record that document is hereby designated as Exhibit I.

—3—

The Baconsfield Clubhouse, a building located in Baconsfield Park was erected with the assistance of federal funds totaling approximately \$16,512.80 furnished by the Works Progress Administration, an agency of the United States, in accordance with two projects sponsored by the City of Macon acting with a group known as the Woman's Club House Commission as more fully reflected in Exhibits J, K, L, M, N and R attached hereto. In its applications for federal funds for this project, the City of Macon, by its Mayor and Treasurer, executed numerous documents constituting agreements, assurances, certificates, representations and contracts, which are contained within Exhibits K and M. The City repeatedly represented to the United States, *inter alia*, that it was sole owner of the Baconsfield Park property, that its ownership was perpetual, that there were no reversionary or revocation clauses in the ownership documents, that the property was not private property, and that the proposed project was for the use [698] or benefit of the public. In a sworn certificate executed under oath by the Mayor and Treasurer of the City of Macon on October 14, 1938, and quoted in full below, the City promised that there would be no discrimination against any group or individual in the use of

the property and that the City did not intend to release jurisdiction of the property during its useful life. The entire certificate, which is contained in Exhibit K attached hereto, reads as follows:

"With reference to Works Progress Administration Project Application State Serial No. 6586, this is to certify that the proposed building referred to in plans, specifications and other data submitted to support the project applications, as 'Baconsfield Club House' will, upon completion, be used as a community club house for the general use and benefit of the public at large, without discrimination against any individual, group of individuals, association, organization, club or other party or parties who may desire the use of the building and the property upon which the building is located.

"It is further certified that the City of Macon, as project sponsor and owner of the property upon which the building is to be constructed, does not intend to lease, sell, donate or otherwise convey title or release jurisdiction of the property together with improvements made thereon, during the useful life of the improvements placed thereon through the aid of W. P. A. funds.

"It is further certified that the City of Macon, as project sponsor, will be responsible to see that the property together with the improvements made thereon will be maintained for the general use and benefit of the public, and will not be [699] used for the profit or benefit of any one individual or specific group or organization; and the management of the property, together with improvements made thereon, will at all times be subject to the approval of the designated city official or officials of the City of Macon who will

be responsible to see that the foregoing certification is adhered to."

/s/ CHARLES L. BOWDEN
Mayor, City of Macon, Georgia

/s/ FRANK BRANAN
Treasurer, City of Macon, Georgia

Sworn to and subscribed before me
this 14th day of October, 1938.

/s/
Notary Public
Bibb County, Georgia

[700] Another certificate or agreement containing assurances that the property would not be disposed of to any private individual and would be operated for the benefit of the general public, dated September 7, 1938, was executed by the Mayor and Treasurer of the City of Macon and by the President and Treasurer of the Women's Club House Commission, and is a part of Exhibit M, attached hereto.

It would be a violation of intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment, as well as a violation of their rights under the federal statutes pursuant to which the Works Progress Administration furnished funds for Baconsfield Park, i. e., the several Emergency Relief Appropriations Acts enacted by the Congress in 1935, 1936, 1937, 1938 and 1939, for the court to grant the relief requested by the successor trustees' motion for summary judgment, and for the court to refuse to order the continued operation of Baconsfield as a public park maintained without racial discrimination.

—4—

On February 3, 1920, the City of Macon entered into an agreement with the Executors and Trustees of the Estate of Senator A. O. Bacon, with the written assent of all legatees and beneficiaries of the estate, by the terms of which the trustees deeded all of the Baconsfield Park property together with certain bonds and accumulated interest to the City of Macon, in consideration of various promises of the City to pay an annuity of \$1,665 per annum to the trustees during the life of Mrs. Mary L. Bacon Sparks. The terms of the agreement are set out in Exhibit O attached hereto. By deed executed February 4, 1920, [701] and recorded February 10, 1920, in the Clerk's office of the Bibb Superior Court in Deed Book 248, page 11 (which deed has heretofore been filed herein as Exhibit F), all interests of the trustees and heirs and legatees of Senator Bacon was conveyed to the City of Macon. The City paid to the trustees under the will of A. O. Bacon the agreed annuity for 25 years from 1920 until the death of Mrs. Mary L. Bacon Sparks in April 1944, that is a total of \$41,625.

On February 3, 1920, the City of Macon, also entered into an agreement with Custis Nottingham, one of the executors and trustees under the will of A. O. Bacon, wherein Nottingham agreed to surrender his occupancy of a residence at Baconsfield in return for a cash payment from the City of \$5,100. The City appropriated this amount and paid it to Custis Nottingham. (See Exhibit O, attached hereto.) Custis Nottingham, by quit claim deed conveyed all his interest in the said Baconsfield Park property to the City of Macon. The said deed, previously filed herein as Exhibit G, was executed February 4, 1920, and recorded February 13, 1920, in the Clerk's office of the Bibb Superior Court in Deed Book 248, page 16.

In view of the foregoing the successor trustees under the will of A. O. Bacon, and all legatees and beneficiaries of the estate of A. O. Bacon, are estopped from claiming any right, title or interest in the Baconsfield trust property, and from claiming the relief sought in the successor trustees' pending motion for summary judgment. Intervenors also rely upon these facts and circumstances in connection with their opposition to the grant of relief sought by the motion for summary judgment based upon the Fourteenth Amendment to the Constitution of the United States.

—5—

[702] An application of the reverter doctrine or other doctrine finding a failure of the trust on the facts of this case would amount to a judicial sanction which imposed a penalty because the agencies managing Baconsfield Park fulfilled their Fourteenth Amendment obligation to operate the park on a racially nondiscriminatory basis. The use of such a judicial sanction in these circumstances would violate the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

—6—

The due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States require that the racially exclusionary words of Senator A. O. Bacon's will relating to Baconsfield Park be treated by the courts as *pro non scripto* as though they were never written. This is required, firstly, because the racially exclusionary terms were written in the will to conform to racially exclusionary suggestions and requirements of Georgia Code Section 69-504 (Georgia Acts 1905, p. 117). The racial portions of Section 69-504 are void under the Fourteenth Amendment, and indeed were void

ab initio even under the "separate but equal" doctrine, by authorizing the total exclusion of Negroes from public parks, and thus must be regarded as *pro non scripto*. Secondly, it is required because by the City's acceptance of the park, pursuant to Georgia Code Section 69-505 (Georgia Acts 1905, pp. 117-118), and its operation of the park in accordance with Bacon's will, the will was made a part of the City's own laws governing the operation and use of the park, and is to be [703] treated in the same manner as if the racially exclusionary words appeared in a city ordinance.

—7—

There is a public easement in the Baconsfield Park land, as in the case of a "commons," which exists separate and apart from the City's legal title as trustee, and which may not be defeated or affected by the termination of the trust.

The Baconsfield Park property was dedicated to the public and the dedication was accepted, thus the property may not now be appropriated for private use.

To grant the relief sought by the successor trustees would be a violation of Georgia Code Section 85-410, which provides as follows:

85-410. Dedication lands to public use, effect of.—

If the owner of lands, either expressly or by his acts, shall dedicate the same to public use, and the same shall be so used for such a length of time that the public accommodation or private rights might be materially affected by an interruption of the enjoyment, he may not afterwards appropriate it to private purposes.

—8—

The City of Macon has not offered any justification for its request for permission to resign as trustee of Bacons-

field except in its inability to conform to the racially exclusionary portions of the will of Senator Bacon. The City Council has not taken any further action renewing its request to resign as trustee subsequent to the decision of the United States Supreme Court in this case. Furthermore, the provisions of Senator Bacon's will plainly contemplated that the Mayor and [704] City Council of Macon should select a successor trustee if the City was legally unable to continue as trustee. The referenced portions of Senator Bacon's will, which appear in item 10th of the will (at page 24 of the record as printed for use in the Supreme Court of the United States), are as follows:

If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation.

—9—

By virtue of all the facts and circumstances presented on the record of this case the City of Macon has so invested the Baconsfield Park with a public character, and the City

has become involved to such an inextricable extent, that it would be a violation of the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment for the state courts to apply any state law doctrines [705] (whether relating to trust law, the law of dedication, real property law, or other principles), so as to defeat the rights of the intervenors to racially non-discriminatory use and access to the park as a public park.

[706] WHEREFORE, intervenors pray that this Court:

- (a) Grant them the relief heretofore prayed in their Response and in their Supplemental Response to the Motion for Summary Judgment;
- (b) Enter an order which will assure and protect their right to racially nondiscriminatory use and access to Baconsfield Park and all its facilities; and
- (c) Grant them such other and further relief as to this Court may seem just and proper.

This 9th day of August, 1967.

/s/ WILLIAM H. ALEXANDER
WILLIAM H. ALEXANDER
859½ Hunter St., N. W.
Atlanta, Georgia 30314

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019
Attorneys for Intervenors

(Certificate of Service Omitted in Printing.)

[708]

EXHIBIT "J"**AFFIDAVIT OF WILLIAM H. ALEXANDER****GEORGIA, FULTON COUNTY.**

I, WILLIAM H. ALEXANDER, one of the attorneys for Rev. E. S. Evans, et al., intervenors in the case of *Charles E. Newton, et al., v. City of Macon, et al.*, Bibb Superior Court, Case No. 25864, being duly sworn, depose and say:

1. That on June 29, 1967, I made an inspection of, and a personal visit to, the inside of the Woman's Clubhouse located on Baconsfield Park in the City of Macon, Georgia.
2. That I was accompanied on said inspection by James M. Nabrit, III, Esq., one of the attorneys for said intervenors.
3. That at the time that I made the said inspection I saw two plaques bolted to one of the walls inside of the said clubhouse.
4. That the following are exact copies of the information or wording contained on each of the plaques:

Plaque No. 1:

"Baconsfield Woman's Club

Erected 1939

By Macon Women's Club

Pilot Club

Business and Professional Women's Club

With Assistance From

Works Progress Administration

Building Committee

Kate Crump Booth
Odessa Pierce Williams
Mamie Walton Vinson
Ellamae Ellis League
Architect"

[709]

Plaque No. 2:

"Built by
Works Progress
Administration
1939"

This 7 day of August, 1967.

WILLIAM H. ALEXANDER
William H. Alexander
859½ Hunter St., N. W.
Atlanta, Georgia 30314

Subscribed and sworn to before me,
this 7th day of August, 1967.

ALICE M. LEWIS
Notary Public

(N. P. Seal)

Notary Public, Georgia State at Large
My Commission Expires June 24, 1968

[710]

EXHIBIT "O"

February 3, 1920—Pages 106-107

The following resolution by alderman Merritt and unanimously adopted after an explanation of the same made by the Mayor:

"Be it resolved by the Mayor and Board of Alderman of the City of Macon, that the Mayor be and is hereby, authorized in behalf of the City of Macon to make and enter into a contract with the Executors of the Estate of A. O. Bacon, deceased, to take possession of the property known as "Baconsfield" upon the terms and conditions as set forth in the communication this day submitted to this Council by R. C. Jordan and Curtis Nottingham, Executors and Trustees of the Estate of A. O. Bacon, deceased.

"Be it further resolved that the Mayor be, and is hereby, authorized to make and enter into a contract with Custis Nottingham to secure the possession of the house now occupied by said Custis Nottingham on said property known as 'Baconsfield', said Custis Nottingham under the terms of said contract shall surrender and terminate any and all rights that he may now have—, or hereafter acquire, to the occupancy of said house or any of the property used in connection with his occupancy of said house.

"Be it further resolved that the said Custis Nottingham shall be paid a sum not in excess of \$5,100.00 as full and final payment and settlement of his surrender of said premises, and the termination of such rights of occupancy as he may hold to said premises, and that the sum of \$5,100.00 be, and is hereby, appropriated for said purpose."

The following communications were accompanied by said resolution:

"To the Honorable Mayor and Council of the City of Macon:

"We beg to advise that we will assent to your immediate possession of the tract known as 'Baconsfield', devised by Senator Augustus O. Bacon to you as a park. This assent is predicated upon the signed agreement executed by all of the legatees and beneficiaries of the estate that you account to us in the amount of \$1,665.00 annually as the rental value of said property [711] during the life of Mrs. Marilu Bacon Sparks.

"At the time of delivering possession of this property to you, we will also deliver to you, under terms 9 and 10 of said will, \$10,000.00 in Five Per Cent. Macon Railway & Light Company Gold Bonds and accrued interest thereon, amounting to approximately \$3,000.00, the aggregate of which you will cover into your Treasury for the improvement of said park, executing to us an agreement as to future appropriations for maintenance of park or at least five per cent annually on said sum of \$10,000.00 in five per cent. gold bonds, plus five per cent. interest on the amount of accrued interest at the dates said sums are delivered.

"It is also understood that the other estate of Senator Bacon will not be charged with taxes or other assessments of any nature or kind against this property accruing after this property is delivered to you.

"As this Park will not only be of immense benefit to the City, but is established by the Senator as a memorial to his deceased Boys, we assure you of our earnest desire to expedite its enjoyment and improvement.

(Signed) R. C. JORDAN

CUSTIS NOTTINGHAM

Executors and Trustees of the Estate of
Senator A. O. Bacon."

"To the Honorable Mayor and Council of the City of Macon:

"In consideration of your taking over the property at BACONSFIELD devised as a Park, I hereby agree that my occupancy of the residence on same will be adjusted and terminated on the basis agreed upon between the Mayor, the City Attorney and myself, to-wit: Fifty One Hundred (\$5100.00) Dollars.

"You may, at any time within fifteen days from this date, exercise this option and take over said residence.

(Signed) CUSTIS NOTTINGHAM."

[712] I, Alex Cameron, Clerk of the City of Macon, Certify that the resolution and communications on the attached page are accurate statements of the official minutes of the City Attorney and myself, to-wit: Fifty One Hundred Minutes of the Council dated February 3, 1920, Pages 106-107.

(Signed) ALEX B. CAMERON
Alex Cameron
Clerk, City of Macon, Georgia

(Seal) Seal of the City of Macon, Georgia 1823

[713]

EXHIBIT "P"

February 17, 1920—Page 112

The Mayor called attention to the taking over by the City of the Baconsfield Park under the will of the late U. S. Senator A. O. Bacon. The terms of this will, he said, provide that the park shall be under the control and management of four ladies and three men, and that Senator Bacon had requested that one of the members, at all times as far as practicable, be one of his blood relations. He stated that this Board of Control is to be first named by the Mayor and Council and thereafter is to be self-perpetuating, vacancies being filled by the remaining members of the Board and confirmed by the Mayor and Council.

The Council then went into the election of the Board of Control referred to, the result being as follows:

Mrs. Willis B. Sparks,
Mrs. W. P. Coleman,
Mrs. H. M. Wortham,
Mrs. P. L. Hay,
Mayor G. Glen Toole,
Dr. W. G. Lee,
Mr. John L. Anderson.

In nominating Mayor Toole as a member of this Board, Alderman Hunnicutt had the Clerk read the following communication addressed to Mayor by Messrs. R. C. Jordan and Custis Nottingham, the trustees of the Bacon Estate:

"In turning over to the City of Macon the park devised to it by Senator Bacon, permit us to express the hope that this Park will mean all to the white citizens of Macon that Senator Bacon wished it to mean.

"The place is one of great natural beauty, but it could easily be marred by haphazard work. We are sure that before anything material is done to this property that you, the City Council, and the Commission appointed by it will have a well defined and permanent plan of improvement in view.

"We believe that it is of the utmost importance that you be a member of this Commission, and wish here to voice the hope that you will not decline such service from any false [714] modesty. It will greatly expedite the people's enjoyment of this property if the Commission is headed by the head of our City Government. Differences in opinion and change of plans will be thus avoided, and the money essential to the improvement of this property will be expended by the one charged with raising it."

The Clerk was directed to notify the members of their election.

I, Alex Cameron, Clerk of the City of Macon, certify that the above is an accurate excerpt of the official minutes of the City Council of the City of Macon as contained in Minutes of the Council dated February 17, 1920, Page 112.

(Signed) ALEX B. CAMERON
Alex Cameron
Clerk, City of Macon, Georgia

(SEAL OF THE CITY OF MACON, GEORGIA 1823)

[715]

EXHIBIT "Q"

July 21, 1936—Page 427

The Committee on Finance reported on the following resolution as follows:

RESOLUTION

WHEREAS, the late Senator A. O. Bacon, by his last will and testament, set aside property now known as "Baconsfield Park", in trust for the sole, perpetual, and unending use, benefit, and enjoyment of the white women, white girls, white boys, and white children of the City of Macon, to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers," and,

WHEREAS, the Board of Managers of said property, now consisting of G. Glen Toole, Chairman, Dr. W. G. Lee, Secretary and Treasurer, Herbert I. Smart, Mrs. P. L. Hay, Mrs. Frederick Williams, Mrs. Thomas J. Stewart, and Mrs. H. M. Wortham, believing that the generous and kindly purpose of Senator Bacon will be further served, and the use of "Baconsfield Park" rendered more enjoyable to his beneficiaries, have resolved, if possible, to install and maintain upon "Baconsfield Park" a swimming pool, to be used by the members of the public described in the will of Senator Bacon, and,

WHEREAS, in order to finance the construction of the swimming pool, the Board of Managers have resolved that the funds be secured in three ways, to wit:

(1) By the City of Macon Converting into cash, in accordance with item 10 of the will of Senator Bacon, ten bonds of the Macon Railway and Light Company, of the

denomination of \$1,000.00 each, which were provided by Senator Bacon for the upkeep and maintenance of said "Baconsfield Park;"

(2) By obtaining from an agency of the Federal Government a grant of money to be used for the intended purpose;

(3) By obtaining from public spirited citizens of [716] Macon loans to bear interest at the rate of three (3) per cent. per annum, and to be repaid pro rata from the net income derived by the Board of Managers from small fees charged persons using the swimming pool and facilities; and,

WHEREAS, in reference to the request made of the City of Macon by the Board of Managers in respect to the ten bonds of the Macon Railway and Light Company, it is provided in the will of Senator Bacon, and in Item 10 thereof, "Should the Mayor and Council of the City of Macon at any time consent to do so, then I direct that they be authorized to receive the fund constituted of said bonds and all additions thereto, and the proceeds thereof, and cover the same into the treasury of the City, in consideration of the perpetual obligation of the City to be evidenced by its bond or otherwise, to provide and pay over annually to the said Board of Managers an amount equal to five per centum interest upon the sum thus covered into the treasury, to be devoted by said Board to the uses hereinbefore specified,"

Now, THEREFORE, the Mayor and Board of Alderman of the City of Macon, by this resolution endorse the action taken by the Board of Managers of Baconsfield Park, and pledge their support of the object sought, calling upon and enlisting the aid of all citizens in the efforts of the Board of Managers to obtain a portion of the cost of such

swimming pool by loans from citizens, and pledging themselves in the name and behalf of the City of Macon to provide by ordinance or resolution, if legally possible, and if the Board of Managers is successful in obtaining from a Federal agency and from the public generally the balance of the cost of such swimming pool, the proceeds of the Macon Railway and Light Company bonds, in accordance with the provisions of Senator Bacon's will, and to pledge such proceeds to the cost of the swimming pool and facilities.

[717]

REPORT OF FINANCE COMMITTEE

"Your committee recognizes the importance of a municipal swimming pool in our city, and there has been submitted to the Public Works Administration in Washington, D. C., a project for the erection of one.

If and when the necessary funds are secured from the Federal Government and other sources, we recommend that these bonds be sold and the proceeds used on the above named project." This report was adopted.

I, Alex Cameron, Clerk of the City of Macon, certify that the above Resolution and Report are accurate copies of the official minutes of the City Council of the City of Macon as contained in Minutes of the Board dated January 21, 1936, Page 427.

(Signed) ALEX B. CAMERON
Alex Cameron
Clerk, City of Macon, Georgia

(SEAL OF THE CITY OF MACON, GEORGIA 1823)

[718]

EXHIBIT "R"

June 2, 1938—page 639

The members of the Baconsfield Club House Commission composed of representatives of the Macon Women's Club, the Business and Professional Women's Club and the Pilot Club, were present and Alderman Harrold introduced them to Council. Mayor Bowden invited them to be heard and the spokesman, Mrs. Leonard Booth, came forward and asked permission of Council for the clubs represented by the Commission to build with W. P. A. assistance, a new Woman's Club House in Baconsfield and to tear down the house now used as a club house by the women and use such of the materials as are suitable in the construction of the new building. She said that the new club house would be a memorial to Senator Bacon and would be a \$15000.00 building, of which cost the clubs will obligate themselves to pay three thousand dollars. She said the clubs will sell bonds to raise this money.

On motion of Alderman Harrold, seconded by Alderman Pittman, the permission sought, was granted by the Mayor and Council.

Mayor Bowden appointed the following gentlemen to be members of the Housing Authority for the City of Macon subject to the approval of the Governor of Georgia:

J. Clay Murphey, Chairman, to serve for a period of five years,

W. T. Anderson, to serve for four years

George R. Williams to serve three years

Wallace Cobb to serve two years, and

Ernest D. Black, to serve one year.

Adjournment.

[719]

I, Alex Cameron, Clerk of the City of Macon, certify
that the above is an accurate excerpt of the official minutes
of the City Council of the City of Macon as contained in
Minutes of the Council dated June 21, 1938, Page 639.

(Signed) ALEX B. CAMERON
Alex Cameron
Clerk, City of Macon, Georgia

(SEAL OF THE CITY OF MACON, GEORGIA 1823)

[720]

EXHIBIT "S"

January 10, 1939—Page 30

23. Central City & Baconsfield Parks

a. Labor	\$ 7,000.00
b. Repairs to parts and equipment	800.00
c. Repairs to Building	1,200.00
d. Lights Central City Park	40.00
	<hr/>
	\$ 9,040.00

I, Alex, Cameron, Clerk of the City of Macon, certify
that the above is an accurate copy of the official minutes of
the City Council of the City of Macon as contained in Min-
utes of the Board dated January 10, 1939, Page 30.

(Signed) **ALEX B. CAMERON**
Alex Cameron
Cler, City of Macon, Georgia

(SEAL OF THE CITY OF MACON, GEORGIA 1823)

[721]

EXHIBIT "T"

January 10, 1939—Page 31

35. Miscellaneous

a.	Baconsfield Park Annuity	\$ 1,655.00
b.	Insurance on Public Property	1,900.43
c.	Self Insurance-Compensation Act ..	100.00
d.	Auditing	900.00
e.	Chamber of Commerce	500.00
		—————
		\$ 5,065.43

I, Alex Cameron, Clerk of the City of Macon, certify that the above is an accurate copy of the official minutes of the City Council of the City of Macon as contained in Minutes of the Board dated January 10, 1939, Page 31.

(Signed) **ALEX B. CAMERON**
Alex Cameron
Clerk, City of Macon, Georgia

(SEAL OF THE CITY OF MACON, GEORGIA 1823)

[722]

EXHIBIT "U"

December 26, 1939—Page 19

34. Miscellaneous

a. Baconsfield Park Annuity	\$ 1,665.00
b. Insurance on Public Property	2,048.50
c. Self Insurance Compensation Act ..	100.00
d. Auditing	900.00
e. Chamber of Commerce	500.00

	\$ 5,213.50

I, Alex Cameron, Clerk of the City of Macon, certify
that the above is an accurate copy of the official minutes of
the Board Aldermen of the City of Macon as contained in
Minutes of the Board dated December 26, 1939, Page 199.

(Signed) ALEX B. CAMERON
Alex Cameron
Clerk, City of Macon

(SEAL OF THE CITY OF MACON, GEORGIA 1823)

[723]

EXHIBIT "V"**July 15, 1947—page 458**

Mayor Bowden stated to Council that inasmuch as an appropriation of \$100,000.00 has been made by Council to construct a swimming pool on property under the control of the Baconsfield Park Commission, he believed that construction should be begun as soon as possible so that the pool might be completed, tested and ready for operation by the season of 1948.

He suggested that Alderman John A. Jones, Chairman of the Finance Committee of Council and Alderman Dan L. Tidwell, Chairman of the Recreation Committee of Council, together with the Baconsfield Park Commission, or a Committee of said Commission, be named in a Resolution to handle the construction of said swimming pool.

Mayor Bowden also suggested that the \$100,000.00 so appropriated be deposited in a Trust Fund for the sole and exclusive purpose of constructing a swimming pool and that Mr. C. E. Newton, Jr., Secretary and Treasurer of the Baconsfield Park Commission, be named as the Trust Officer, and/or Trustee to handle said appropriation with authority to pay amounts from said fund when approved by the Swimming Pool Committee.

There being no objection from Council, the Mayor was to prepare the Resolution.

I, Alex Cameron, Clerk of the City of Macon, certify that the above statements are accurate statements of the official minutes of the City Council of the City of Macon as contained in Minutes of the Board dated July 15, 1947, Page 458.

(Signed) **ALEX B. CAMERON**
Alex Cameron
Clerk, City of Macon, Georgia

(SEAL OF THE CITY OF MACON, GEORGIA 1823)

EXHIBIT "K"

[724]
GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

To all to whom these presents shall come, Greeting:

I Certify That the attached copy, or each of the specified number of attached copies, of the document(s) identified below is a true copy of a document in the legal custody of the Administrator of General Services and deposited with the National Archives of the United States.

Records of the Work Projects Administration, Record Group 69

Microfilmed Project Folders, Georgia: Selected Documents from the Project Folder Relating to Official Project 665-34-2-164 (Roll 2363W).

In testimony whereof, I, ROBERT H. BAHMER, Archivist of the United States, being duly authorized (41 CFR 101-7.104-3), have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Director, Social and Economic Records Division

of the National Archives, in the District of Columbia,
this 21st day of July 19 67

Robert H. Bahmer
Archivist of the United States
By Jesse F. Smith

40

Form WPA-C-1145

WORKS PROGRESS ADMINISTRATION OF GEORGIA
128 POSEY STREET BUILDING
ATLANTA, GEORGIA

Date November 28, 1940

AUTHORIZATION TO COMMENCE OR RESUME WORK

To: Mr. Adrian Escoffier
 Area Engineer
 Works Progress Administration of Georgia
 Area No. 8, Inc.
 Atlanta

This is your authority to commence _____ work on:

G.P. No. WPA-C-2-34 A.P. No. _____

U.P. No. 8000 County Dade

under approval granted on Statement of Project Estimate Detail,
 W.P.A. Form 701 (Revised), dated Nov. 28, 1940 bearing Sequence
 Number 3328.

Yours very truly,

(Miss) May B. Shepperson
 Administrator

By:
 Administrative Assistant

Division of Operations

12195

Sequence No.

NOV 25 1937

421

WORKS PROGRESS ADMINISTRATION - new work project select
STATEMENT OF PROJECT ESTIMATE DETAIL for operation.

Miss Gay B. Shepperson

(Name and address)
I declare that the work project described below be placed in operation and that
approval of its presentation is requested.

A. Lowman P.

(Indicated local official)

Bibb - Macon

(County and city)

Location symbol

26-11

Name of project:

Construct a public community club house in the
City of Macon, Bibb County.

Planning date 11-23-38

Estimated date of completion 8-25-39

City of Macon

Sponsor's No.

G.P. Limitation, \$ 12,313.00

Included in this limitation are work projects Nos.

5530

The separate estimate bearing Sequence No. _____ Dated _____
 The sum and amounts comprises the cost estimates hereby approved, of the above-described project or particular

Item	Item-Number		Description of Project		TOTAL FUNDING
	WPA	Sponsor	WPA	Sponsor	
1.01	13166		8798.00		8798.00
1.02	848		500.00		500.00
1.03	19010		9298.00		9298.00
1.04			3015.00	9006.00	12021.00
1.05			3015.00	9008.00	12021.00
1.06			12313.00	9008.00	21319.00
1.07			X X X X X		
1.08			3015.00	9006.00	12021.00
1.09			12313.00	9006.00	21319.00

Identifying symbols shall appear on every pay roll, requisition, or other correspondence document chargeable
 to this project.

Identifying symbol 0-1146 Official project No. 665-84-2-164 Work project No. 5530

Name or expenditure symbol 665002 (9) Title _____

Approved:

F. J. T. [Signature]

422

WORKS PROGRESS ADMINISTRATION

SPONSOR'S AGREEMENT
For Financing Non-Federal Projects
Emergency Relief Appropriation Act of 1937

To be filled in by State office

Georgia _____

MMO _____

Application No. _____

Application No. **MMO - 30865***Leave blank*

O. P. No. _____

Proj. Letter No. _____

OCT 24 1938

5530

Proposal No. **97-8** _____Date **October 24, 1938** _____

WORKS PROGRESS ADMINISTRATION:

Agreement of expenditures to be made from Federal funds on the proposal designated above, we,

The City of **Decatur** _____

do hereby agree that we will finance such part of the entire cost thereof as is not to be supplied by Federal funds.

City of **Decatur** _____Legal agent **R. W. Young** _____BY **F. BRAHAN, ASST**Legal agent **Charles J. Purdon** _____

[729]

Mr. Ward
Mr. J. J. Penick

Mr. C. P. C. 665-34-2-16-
11/17/38

Com. - P. Morris
21st, 1938, 1/16/39.

Please furnish the information indicated below and return to Room 2000, 203
Thank you.

Date Work Commenced 12/17-38
Date Work Stopped 1/16/39

Federal Expenditures or Disbursements:

Labor 11,173.76

Overtime 2,904.64

Total 14,022.91

Effective as of 2-13-39

Total Present Contribution 700.73

Effective as of 7/13/39

Rev. of O.

Supplementary

Dom —

DL # 2567-297

三

WORKS PROGRESS ADMINISTRATION
STATEMENT OF PROJECT ESTIMATE DETAIL

(Date submitted) _____ (Date and Month) _____
It is desired that the work project described below be placed in operation.
Approval of its prosecution is requested.

A. Newcomer

3 - Macom

Pibb - Macon
(County and city) Location symbol 24-11

construct a Public Community Club House in Macomb

Starting date 11-23-38 *Estimated date of maturity* 9-1-38

City of Macon

Included in this limitation are work products Nos. 5516

Initial expenditure estimate bearing Sequence No. 14436 Dated 6-12-39

...iving time and amounts comprise the cost estimate heretofore approved, of the above-described project or portion
of:

Item	Madras		Suburbia or Poona		Total Price
	WPA	Spanner	WPA	Spanner	
Labour	2432.3		11126.48		11136.48
Total Labour	2432.3		11126.48		11136.48
Total WPA (including Supply Fund reserve)	2914.05		7253.01		10257.06
Total LAB and WPA (including Supply Fund reserve)	2914.05		7253.01		10257.06
Fed Reserve and monthly Rentation	14050.53		7272.01		21322.53
Total Reserves (including Supply Fund reserve)	2914.05	X X X X	7253.01		10257.06
Total APPROVED COST ESTIMATE	34504.53		7252.01		10257.06

Identifying symbols shall appear on every pay roll, requisition, or other document bearing upon the project;

Official project No. 66-2-34-2-164 Work price No. 5520

Value or expenditure symbol **665002(9)**

100

BEST COPY AVAILABLE

PUBLISHER'S NOTICE

**Material on the following frames is
the best copy available to publisher.**

Division of Operations

Sequence No.

12575

426

Date

P.L. #2267

MAY

WORKS PROGRESS ADMINISTRATION A revised estimate of a project previously operated.

STATEMENT OF PROJECT ESTIMATE DETAIL

Elas Guy B. Shopp room

Atlanta, Ga.

I certify that the work project described below is placed in operation.
Approval of its presentation is requested.

As REQUESTED

Area #8 - Macon, Ga.

Bibb - Macon

34-11

Name of project

(Category and name)

Location symbol

Name of project

Construct a public community club house in the City of Macon, Bibb County.

Starting date 11-23-48

Estimated date of completion 8-23-49

City of Macon

Sponsor's No.

123313.00

12330

and O.P. limitation, \$ Included in this limitation are work projects No.

Net Decrease 572 (\$300.00)

12702

Dated 12-20-48

Single expenditure estimate bearing Sequence No.

These items and amounts comprise the cost estimate heretofore approved of the above-described project or portion thereof:

Item	Man-Hours		Expenditure or Price		Total Price
	WPA	Sponsor	WPA	Sponsor	
Land	121168		8798.00		8798.00
Perf.	944		500.00		500.00
TOTAL LABOR	120210		9298.00		9298.00
Material			5015.00	5005.00	10020.00
Number			5015.00	5005.00	10020.00
TOTAL MATERIAL (excluding Supply Fund reserve)			5015.00	5005.00	10020.00
TOTAL LABOR AND MATERIAL (excluding Supply Fund reserve)			123313.00	9298.00	123313.00
Fed reserve and monthly limitation				X X X X X	
TOTAL NONLABOR (excluding Supply Fund reserve)			5015.00	5005.00	10020.00
TOTAL APPROVED COST ESTIMATE			123313.00	9298.00	123313.00

Being identifying symbols shall appear on every pay roll, requisition, or other encumbrance document chargeable to project:

Official project No. 0-1146

Work project No. 622-84-2-184

12330

Work symbol

088002 (8)

Title

Division or expenditure symbol

Approved:

John H. Hendon
State Auditor

V.R. 11-23-48

Division of Operations

Sequence No.

Dec. 1938

Date

P. L. No. 254

421

WORKS PROGRESS ADMINISTRATION A revised estimate of a
STATEMENT OF PROJECT ESTIMATE DETAIL work project previously submitted

Key B. Shepperson

Atlanta, Georgia

I declare that the work project described below to be placed in operation.
 Approval of its prosecution is requested.

January

Area No. 3 - Macon, Georgia

Work project Bibb - Macon

Location symbol 34-11

(County and city)

Construct a public community club house in the City of Macon, Bibb County.

11-23-38

Estimated date of completion 11-23-38

City of Macon

Spanner's No.

U.P. Limitation, \$ 12313.00

Included in this limitation are work projects Nos. 5530

This estimate bearing Sequence No. 12196

Dated 11-23-38

The items and amounts comprise the cost estimate hereby approved, of the above-described project or portion thereof.

Item	Man-Hours		Expenditure or Price		Type of Work
	WPA	Others	WPA	Others	
18146			8798.00		8798.00
845			800.00		800.00
19010			9298.00		9298.00
Total			2815.00	9006.00	11821.00
WPA PAYROLL (excluding Supply Fund reserve)			2515.00	9004.00	11519.00
WPA PAYROLL AND MORTALITY (excluding Supply Fund reserve)			12113.00	9006.00	21119.00
Total reserve and monthly limitation			250.00	X X X X X	250.00
WPA PAYROLL (including Supply Fund reserve)			3015.00	9006.00	12021.00
APPROVED CAMP ESTIMATE			12313.00	9004.00	21377.00

The identifying symbol shall appear on every day roll, requisition, or other document charging project:

Key B. Shepperson 0-1144 Official project No. 668-34-2-104 Work project No. 5530

Name or expenditure symbol 668002 (8) Title

Approved:

JAY B. SHEPPERSON
[Signature]

DEC 30 1938

(Date)

U. S. GOVERNMENT PRINTING OFFICE

Works Progress Administration
 1938
 Division of Operations

**WORKS PROGRESS ADMINISTRATION
PROJECT PROPOSAL**

Reported, \$ 12313.35 OCT 24, 1934 WPA Work Project No.

Reported, \$ Serial No. 6588 - 1116631

(Spanner not to wear above line.)

Proposal No. 87-3

Date of proposal 10-24-34

Signed as

(W.A. SRA. WPA)

Project No.

(U.W.P.A. Proj. O. P. No.)

WORKS PROGRESS ADMINISTRATION OF Macon Area #3 Georgia
(City, town, village) (County)

and is hereby made that the following proposal be reviewed and that a formal application be made for an allotment of funds for this project under the rules and regulations of the Works Progress Administration.

City of Macon Macon Bibb
(Post office address—city, town, village) (County)Name of project: Macon Bibb
(City, town, village) (County)Location: Bassfield Park, North Highlands District, Macon, Approximately one mile East of Court House.

Size of project:

Summary of estimated costs:

Item of cost (a)	Federal funds (b)		Spanner's funds (c)		Total (d)
	Amount (dollars)	%	Amount (dollars)	%	
Filled.	2231.00	18.94			2231.00
Intermediate	1898.00	15.81			1898.00
Rilled	4623.00	37.59			4623.00
Professional and technical	450.00	3.68			450.00
Total (a)	8798.00	71.68			8798.00
Reserve	500.00	4.08			500.00
Interest (at plus 3%)	8298.00	75.51			8298.00
Material, equipment, and other costs:					
Material and supplies	3000.15	24.36	8004.33	23.43	11004.48
Equipment rentals			450.00	5.00	450.00
Our direct costs	18.00	.15	500.00	5.56	518.00
Interest (c) only	3018.15	24.43	8008.33	23.00	12026.48
Total cost of project	12313.35	100	3008.33	100	15321.68
Total cost apprenticeship	57.75	%	43.24	%	100%

To determine a community club house building
elderly and apartment work.
Spencer has legal authority to operate project.
Perform all necessary
Work under this estimate inclusive.

	1000	Cu. Yds.	Bathmark
	31	Cu. Yds.	Concrete Work
	64.061	M.Y.	Priming
	2.08	M.Y.	Roofing
	6.782	sq.	Floors & Insulation
	8.785	M.Y.	Sanding & Ceiling
	380	M.Y.	Marble & Plastering
	2600	sq. ft.	Tylite & Ceramic Tile floors
	1823	sq. ft.	Lathing & Plastering
	247	sq.	Painting

Total man-months of work:

(a) Certified workers paid from Federal funds, man-months	180
(b) Total workers paid from Federal funds, man-months	180
(c) Total workers paid by Sponsor, man-months	0
(d) Total man-months, all workers	180

Total Federal expenditure per man-year of labor:

Total Federal cost of project (Item 4, col. 2, total)
 Man-months labor (Item 8 (b))
 $\times 1.2 = \$$ **300,48**

Survey plan and preparations will be complete

As Required

Plan and specifications will be complete

As Required

(statistical, survey, and research projects only). Complete specifications, copies of forms, schedules, instructions, etc., can be submitted herewith. Work can be started on _____ day after date to proceed, and it is estimated that _____ working days will be required for completion.

The sponsor, project will be superintended by Ellenne Ellie Langen, Architect.

Assurance and operation or publication of results of completed project will be provided as follows:

Women's Club

Proposed has been approved by the following public planning or other agencies concerned:

Woman's Club and City of Blooms

will assume responsibility for results and will assume responsibility for completion in
 that funds allotted to project are inadequate.

City at which project will be conducted is owned by

City of BloomsOwner has jurisdiction to conduct project on this property.

Project may be conducted on public property of State, county or local governments; on Federal property, with permission of proper Federal authority; or on property owned by the owner. If project is to be conducted on Federal property, there should be stated in this section the name of Department having jurisdiction over the property.

Ability of this project will or not depend upon the completion of other public or private work. Explanation(and construction projects only.) Project is not on Federal Aid Highway.Estimated Federal cost per mile: \$ 1000000 (Indicate and estimate) 0 (Certify) 0 (Landscape)

Statement (A short, concise statement giving reason or necessity for the proposed project, including any enclosure for statements about the nature of the work. Use additional sheet if necessary.)

At present there is no women's club or community house in Blooms.

43

Any item, 43 above should be listed under appropriate classifications. These rates should agree with those determined by the State or the Program Administrator as acceptable for local WPA District Director's schedule. For separate rate entries to different local offices, and Federal or Reserve funds. For entries 2, 3 and 6, use general rates for General labor only. Estimate hours employed in column "Time" (F).

Classification	Number of Workers	Rate per Hour	Number of Hours	Total Time	Dollars		
					Federal	State	Total
1	1						
2	12	C	5040	134.80	\$4.84	2331.80	2331.80
Subtotal	12		5040	134.80		2331.80	2331.80
3	5	C	8010	134.85	\$5.00	264.00	264.00
Helper	5	C	8010	134.85	\$5.00	264.00	264.00
Reserve Helper	5	C	804	134.85	\$5.00	264.00	264.00
Reserve	1	C	670	134.85	\$5.00	264.00	264.00
Subtotal	6		8784	134.85		264.00	264.00
4	8	G	2880	67.40	67.00	2880.00	2880.00
Waiter	8	G	2880	67.40	67.00	2880.00	2880.00
Waitress	1	G	201	67	67.00	201.00	201.00
Reserve	8	C	608	67	67.00	608.00	608.00
Waiter	1	C	201	67	67.00	201.00	201.00
Waitress	8	G	201	67	67.00	603.00	603.00
Reserve	1	C	610	67	67.00	603.00	603.00
Subtotal	17		8174	67.40		4247.00	4247.00
5	1	C	848	169	\$50.00	848.00	848.00
Subtotal	1		848	169		848.00	848.00
6	1	S	848	169	\$100.00	848.00	848.00
Subtotal	1		848	169		848.00	848.00
7	1	C	10010	134.85		2698.00	2698.00
Subtotal	1		10010	134.85		2698.00	2698.00

432

— and continuity

Method and materials analysis

In direct costs, including safety measures, transportation of workers, tools and machinery equipment lost resulted in cell 19, and 20.

[768]

741

434

Work by hours of work:

CERTIFICATE:

justify that the funds specified in this proposal, to be furnished by the sponsor (or equivalent values in equipment), will be available for the prosecution of this project as needed.

L.L. Brown

Riffkuppen 25mm

7/1/88

EXHIBIT C: CERTIFICATE:

ments contained in this proposal have been checked by the undersigned and are true to the best of his knowledge. It is agreed that the Works Progress Administration is under no obligation to complete the project proposed, if dictated for operation (this sentence shall be deleted for Federal projects). This project will not cover work for which disposition of the sponsor are currently appropriated, or work included in the normal governmental operations agency; it will not result in the displacement of regular employees of this agency. This sponsoring agency is a public air raid control authority to promote the type of work proposed. The work proposed will be done in full conformance requirements. It is understood that Federal funds will be expended by the United States Treasury only upon payment entitled by the Works Progress Administration; and agreed that all operations will be in accordance with regulations under the Emergency Relief Appropriation Act of 1939 and orders and regulations issued thereunder. This fund for the use or benefit of the multim-

Charles L. Bowles
Formerly a member

Appropriation Act of 1939 and orders and
public.

Leo Shuster Mayor

9-8-193

INSTRUCTIONS TO FIRM FOR PREPARING THE PROJECT PROPOSAL

use of the project proposal; and the furnishing of supplementary explanatory data are responsibilities of the spec-
ialists advised to confer with local and district offices of the Works Progress Administration to obtain information
on occupational classifications, wage rates, working hours, and other matters of local application.

In type projects, the project proposal should be accompanied by plans or drawings and general specifications in such a way as to permit intelligent review. Other supplementary data, to accompany the project proposal, may include a description of the methods arranged for conducting the work and cost estimations.

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[818]

EXHIBIT "K"

Copy: Mr. Adrian Newcomer, Macon

October 11, 1938

Application, State
Serial No. 6586
Construct Community
Club House, Macon,
Georgia, Bibb County

Honorable Charles L. Bowden, Mayor
City of Macon
Macon, Georgia

Dear Mr. Bowden:

The proposed project covered in the above identified application, is now undergoing final review in this office, prior to a final decision as to what action will be taken.

In reviewing the information supporting the project application, it is noted that the proposed building is referred to on the plans, specifications and other data as being a woman's club building, which would indicate that the project upon completion would not necessarily be considered a community club house to be used by and for the benefit of the general public at large.

It is noted in the statement signed jointly by yourself, the City Treasurer, and officers of the Woman's Club House Commission, dated September 7, that reference is made to the project as being the Woman's Club House, and that the property on which the improvements will be made will not be disposed of to a nongovernmental body during the operation of the project. In the prospectus outlining the

purpose for which the building will be used, which prospectus is signed by the President and Treasurer of the Woman's Club House Commission, it is noted that the club house will be operated under the jurisdiction of the Woman's Club. The prospectus does not bear the signatures of the sponsoring officials.

[819] In order to establish the full purpose for which the building will be used upon its completion, and to assure that the property together with the improvements to be made thereon with the aid of WPA funds, will be maintained for the general use and benefit of the public at large, we consider it necessary to request an additional statement from the City of Macon, the project sponsor, similar to the following, making reference specifically to Project Application State Serial No. :

"With reference to Works Progress Administration Project Application State Serial No. 6586, this is to certify that the proposed building referred to in plans, specifications and other data submitted to support the project application, as 'The Woman's Club House' will, upon completion, be used as a community club house for the general use and benefit of the public at large, without discrimination against any individual, group of individuals, association, organization, club or other party of parties who may desire the use of the building and the property upon which the building is located.

"It is further certified that the City of Macon, as project sponsor and owner of the property upon which the building is to be constructed, does not intend to lease, sell, donate, or otherwise convey title or release jurisdiction of the property together with improvements made thereon during the useful life of the im-

provements placed thereon through the old of W.P.A. funds.

"It is further certified that the City of Macon, as project sponsor, will be responsible to see that the property together with the improvements made thereon will be maintained for the general use and benefit of the public, and will not be used for the profit or benefit of any one individual or specific group or organization; and the management of the property, together with improvements made thereon, will at all times [820] be subject to the approval of the designated city official or officials of the City of Macon, who will be responsible to see that the foregoing certification is adhered to."

We regret to inconvenience you further for additional information in connection with the proposed project and wish to assure you that we will be glad to give the proposed work immediate further consideration upon receiving a statement in triplicate, similar to the foregoing, notarized and signed by yourself and the City Treasurer, together with a certified and signed by yourself and the City Treasurer, together with a certified copy of the deed to the property upon which the building is to be located.

Yours very truly,

(Miss) Gay B. Shepperson
Administrator

Administrative Assistant

JJL/MM

[821]

CITY OF MACON
OFFICE OF THE MAYOR

Charles L. Bowden
Mayor

Henry W. Pittman
Mayor Pro-Tem

October 22, 1938

Hon. John J. Lambert
Administrative Assistant
Works Progress Administration of Georgia
Ten Forsyth Street Building
Atlanta, Georgia

Dear Mr. Lambert:

I hope that you will pardon our delay in sending to you certified copy of the deed of Senator A. O. Bacon covering Baconsfield Park property on which Baconsfield Club House is proposed to be erected. This is a public park left to the city by Senator Bacon in his Will and has been used for years by the City of Macon.

The Club House will be for the benefit and use of the public and while the name "Women's Club House" would indicate it would not be operated for the public this is the way it is operated.

The name of the project should be "Baconsfield Club House" instead of the Woman's Club House or whatever name it carried.

We are enclosing in triplicate the statement as requested by you, also copy of that part of the Will relating to this property.

If there is any further information that you will like to have please let us know.

Most sincerely,

Chas. L. Bowden
Chas. L. Bowden
MAYOR

CLB/r
Encl.-4

[822] "With reference to Works Progress Administration Project Application State Serial No. 6586, this is to certify that the proposed building referred to in plans, specifications and other data submitted to support the project applications, as 'Baconsfield Club House' will, upon completion, be used as a community club house for the general use and benefit of the public at large, without discrimination against any individual, group of individuals, association, organization, club or other party or parties who may desire the use of the building and the property upon which the building is located.

"It is further certified that the City of Macon, as project sponsor and owner of the property upon which the building is to be constructed, does not intend to lease, sell, donate or otherwise convey title or release jurisdiction of the property together with improvements made thereon during the useful life of the improvements placed thereon through the aid of W. P. A. funds.

"It is further certified that the City of Macon, as project sponsor, will be responsible to see that the property together with the improvements made thereon will be main-

tained for the general use and benefit of the public, and will not be used for the profit or benefit of any one individual or specific group or organization; and the management of the property, together with improvements made thereon, will at all times by subject to the approval of the designated city official or officials of the City of Macon, who will be responsible to see that the foregoing certification is adhered to."

Chas. L. Bowden
Chas. L. Bowden, Mayor
City of Macon, Georgia

Frank Branan
Frank Branan, Treasurer
City of Macon, Georgia

[823] Sworn to and subscribed before me
this 14th day of October 1938

Elizabeth Ledsinger
Notary Public, Bibb County, Georgia

[824]

October 24, 1938

Mr. Adrian Newcomer
Area Engineer
WPA Area No. 3
356 Cherry Street
Macon, Ga.

Dear Mr. Newcomer:

We are returning to you herewith for your files copy of Project Application Form 306, copy of Sponsor's Agreement Form 308, copy of Project Proposal Form 301, duplicate copies of Preliminary Project Proposal Form G-141, copy of a statement signed by the Mayor and City Treasurer of Macon, that the City does not intend to released jurisdiction to the property upon which work is to be performed under the project, copy of a statement, dated September 7, signed by the Mayor of Macon and officials of the Woman's Club that the building will be maintained for the benefit of the general public, and prospectus of the proposed community club house, all bearing State Serial No. 65-30-9, which provides for constructing a community club house building, Macon, Bibb County.

The application is being forwarded to Washington for approval.

Yours very truly

(Miss) Gay B. Shepperson
Administrator
Administrative Assistant

JJL/MM

[847]

EXHIBIT "M"

(See Opposite)

443

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service



To all to whom these presents shall come, Greeting:

I Certify That the attached copy, or each of the specified number of attached copies, of the document(s) identified below is a true copy of a document in the legal custody of the Administrator of General Services and deposited with the National Archives of the United States.

Records of the Work Projects Administration, Record Group 69

Microfilmed Project Folders, Georgia: Selected Documents from the Project Folder Relating to Official Project 65-1-34-52 (Roll 2990W).

In testimony whereof, I, ROBERT H. BAHMER, Archivist of the United States, being duly authorized (41 CFR 101-7.104-3), have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Director, Social and Economic Records Division

of the National Archives, in the District of Columbia,
this 21st day of July 1967

Robert H. Bahmer
Archivist of the United States
By Jesse F. Smith

444

[850]

(See Opposite) 

446

[862]

(See Opposite) 

PROJECT PROPOSAL

Project Number No. 217-3 Date 8/15/39

Begun or likely made that in accordance with the proposed a formal application be made for an authorization to expend Federal funds by the Works Program Administration under its rules and regulations, to the amount of \$2466.00.

1. Name & last of the program with other funds therewith in a project proposal submitted to the WPA: **No** If "No" if "Yes" (Indicate previous proposals)

2. Has a part of the program with other funds included in a previously submitted WPA project? **Yes** If "Yes" indicate previous project number

Project No. **615-34-2-104 - W.P.A. 8830**

3. Is it required in this proposal for the respondent for (a) Completion of work with **87 percent** of additional funds or other work

- (b) Additional funds or other funds, etc.

4. Project location State **Georgia** County **Bibb** City or town **Centerville, Georgia**
Detailed location of project operations

Reservoir Park, Macon, Georgia

5. Purpose and description of work

- (a) Major purpose
(b) Description of work, if any, that is to be done, for home consumption, farm or pasture, and indicate WPA engineering headquarters

Reservoir Park, Macon, Georgia

6. Purpose and description of work
(a) Major purpose
(b) Description of work, if any, that is to be done, for home consumption, farm or pasture, and indicate WPA engineering headquarters

- "Construct a public swimming club house in the City of Macon, Bibb County, and perform

"to whom"

7. Summary of estimated project costs by source of funds (Number dollar amounts below percentages to nearest tenth)

	Source of Funds	Estimated Price	Percent	Total
(a) Labor				
1 Industrial	\$46.00			\$46.00
2 Interstate	629.00			629.00
3 Retail	1062.00			1062.00
4 Professional and Technical	2026.00	82.6		2026.00
5 Materials	280.00	9.5		280.00
6 Equipment	2264.00	91.9		2264.00
7 Materials in plus b				
8 Equipment, material, and other materials costs				
9 Other materials costs				
Subtotal a only	2000.00	8.1		200.00
Total cost of Project	8866.00	100		8866.00
10 Total Cost of Project	8866.00	100		8866.00
11 Total Cost of Project	8866.00	100		8866.00

(a) Total Cost of Project

PAGE 1 OF 1 PAGES ON BOTH SIDES OF THIS PAGE FOR INSTRUCTIONS

GIVE ON OTHER SIDE AND TURN

447

448

[863-865]

(See Opposite) 

450

[874-875]

(See Opposite) 

SPONSOR'S CERTIFICATE AND AGREEMENT:

Sponsor's Proposal No. 217-8

Date August 16, 1939

(The statements contained in this proposal have been checked by the undersigned and are true to the best of his knowledge and belief.) It is certified that this proposed project is for the use or benefit of the public.

(It is understood that Federal funds will be expended by the United States Treasury only upon pay rolls and vouchers submitted by the Works Progress Administration.)

(It is further understood that the project will not be placed in operation unless and until assurance is given that the sponsor's pledge will be made available as specified in the proposal, and as required by project operations.)

(It is agreed that the work proposed, and all operations under the project, will be done in conformance with all requirements, rules and regulations of the Works Progress Administration issued pursuant to the act of Congress under which Federal funds for the prosecution of the project are made available, and in accordance with such regulations as are attached hereto.)

(It is agreed that the Works Progress Administration is under no obligation to initiate operations under this proposal if it is approved, nor to complete the project if placed in operation. Further, in consideration of expenditures of Federal funds to be made on the project, it is agreed, if the proposed work is undertaken, that the sponsor will furnish part of the entire cost thereof as so not to be supplied from Federal funds.)

City of Macon

Macon, Ga.

Sponsor's authorized agent: George W. Johnson
(Name & type of person)

Mayor

Frank E. Johnson
(Name & type of person)

Treasurer

City of
MaconCity of
Macon*Geo. W. Johnson**Frank E. Johnson*Sponsor's authorized agent: Frank E. Johnson
(Name & type of person)

To be filled in by State Office

State	Georgia
FIPS	3100
County	
Total Application No.	0-6586-S2-
Item Application No.	40058

Local Office

O. P. No.
P. I. No.

452

[889]

(See Opposite) 

453

CITY OF MACON
CITY OF MACON

September 7, 1938

the undersigned sponsors of the WOMAN'S CLUB HOUSE,
MACON, GEORGIA, DO AGREE THAT THE PROPERTY ON
THE IMPROVEMENTS WILL BE MADE WILL NOT BE LEASED,
DONATED OR OTHERWISE DISPOSED OF TO ANY PRIVATE
INDIVIDUAL OR CORPORATION, OR TO A QUASI-PUBLIC ORGANIZATION
IN THE OPERATION OF THE PROJECT. IT IS FURTHER AGREED
WHEN THE BUILDING IS COMPLETED, IT IS TO BE MAINTAINED
BY THE CLUB AND OPERATED FOR THE BENEFIT OF THE
GENERAL PUBLIC.

Charles L. Bowden
Charles L. Bowden
Mayor, City of Macon

R. W. Evans
R. W. Evans
Treasurer, City of Macon

Mrs. Leonard Booth
Mrs. Leonard Booth
President, Woman's Club House
Commission

Mrs. Ann Lucas
Mrs. Ann Lucas
Treasurer, Woman's Club House
Commission

[917]

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

[TITLE OMITTED]

INTERVENORS' THIRD SUPPLEMENTAL RESPONSE TO MOTION
FOR SUMMARY JUDGMENT FILED BY SUCCESSOR TRUSTEES
UNDER THE WILL OF A. O. BACON—Filed August 17, 1967

Come now, REV. E. S. EVANS, LOUIS H. WYNNE, REV. J. L. KEY, REV. BOOKER W. CHAMBERS, WILLIAM RANDALL and REV. VAN J. MALONE, intervenors who file this Third Supplemental Response to the motion for summary judgment filed by the successor trustees under the will of A. O. Bacon, and show the Court the following:

—1—

That attached hereto and incorporated herein by reference are the following exhibits:

- (a) Exhibit W—Stipulation between the successor trustees under the will of A. O. Bacon and Rev. E. S. Evans, et al., intervenors.
- (b) Exhibit X—Letter from Mr. Willis B. Sparks, III, to Mayor B. F. Merritt, Jr., of Macon, Georgia, dated May 22, 1964.
- (c) Exhibit Y—Letter from Mayor B. F. Merritt, Jr., of Macon, Georgia to Mr. Willis B. Sparks, III, dated May 28, 1964.
- (d) Exhibit Z—Affidavit of William H. Alexander, one of the attorneys for Rev. E. S. Evans, et al., intervenors.

[918]

WHEREFORE, intervenors pray that this Court:

- (a) Grant them the relief heretofore prayed for in their Response, Supplemental Response, and in their See-

ond Supplemental Response to the Motion for Summary Judgment;

(b) Enter an order which will assure and protect their right to racially nondiscriminatory use and access to Baconsfield Park and all its facilities; and

(c) Grant them such other and further relief as to this Court may seem just and proper.

This 16th day of August, 1967.

/s/ WILLIAM H. ALEXANDER
WILLIAM H. ALEXANDER
859½ Hunter St., N. W.
Atlanta, Georgia 30314

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

Attorneys for Intervenors

[919]

EXHIBIT "W"**IN THE SUPERIOR COURT OF BIBB COUNTY****[TITLE OMITTED]****STIPULATION**

The undersigned parties to the above-styled case agree and stipulate the following:

1.

That Mrs. Mary Lou Bacon Sparks, a surviving daughter of Senator A. O. Bacon and one of his heirs under his will, died on May 31, 1944.

2.

That a public school known as Alexander School No. 3 is maintained and operated by the Board of Education of Bibb County, Georgia, an independent agency created by the Georgia Legislature, and is located across the street from one extreme corner of the park area of Baconsfield. The enrollment of said school during the 1966-67 school year was approximately 410 children all of whom were white. There were no negro children in attendance during that time. The principal of the school is able to make only a rough estimate of the enrollment for the term beginning in September, 1967. She estimates there will be approximately 410 white children and 15 negro children in attendance at that time.

3.

That there are about 12 negro families living within approximately two or three blocks of the park area.

4.

Counsel for the heirs of Senator Bacon enter into this [920] stipulation at the request of counsel for the intervenors E. S. Evans, et al and are willing to stipulate the truth of the above facts but wish to make it crystal clear that they do not in any way acknowledge that the facts stipulated are relevant to any issue in the above captioned case.

/s/ **WILLIS B. SPARKS, 3RD**
WILLIS B. SPARKS, 3RD
*Of Counsel for the Heirs of
Senator Bacon and the Trustees
Under His Will*

August 14, 1967

/s/ **WILLIAM H. ALEXANDER**
WILLIAM H. ALEXANDER
JACK GREENBERG
JAMES M. NABRET, III
*Attorneys for Rev. E. S. Evans,
et al. Intervenors*

August 15, 1967

[921]

EXHIBIT "X"

LAW OFFICES
JONES, SPARKS, BENTON & CORK
PERSONS BUILDING
MACON, GA. 31201

C. Baxter Jones
Edward L. Benton
Charles M. Cork
John W. Smith
A. O. B. Sparks, Jr.
Frank C. Jones
Charles M. Cork, Jr.
Franklin L. Colston
Willis B. Sparks III
Edward Bruce Benton
Carr G. Dodson
Timothy K. Adams
Mayor B. F. Merritt
c/o Mr. Trammell F. Shi
City Attorney
Southern United Building
Macon, Georgia

A. O. B. Sparks
Counsel

May 22, 1964

Dear Mayor Merritt:

I am writing to you as attorney for the Board of Managers of Baconsfield with respect to the lease dated December 21, 1948, between the Board of Managers and the City of Macon. This lease involves property including the Baconsfield swimming pool and the surrounding area.

About a year ago, during the administration of Mayor Ed Wilson, the Board of Managers of Baconsfield brought a suit against the City in the Superior Court of Bibb County seeking to have the City removed as Trustee of Baconsfield because it was failing to enforce the racial limitation essential to the trust purpose of A. O. Bacon. Of course, when your administration came into office, the City of Macon through the City Attorney, Mr. Trammell [922] Shi, quite properly declared in open court its constitutional inability to enforce the trust as set forth by A. O. Bacon. Having declared its legal inability to enforce the racial limitation, the City thereupon tendered its resignation as Trustee of Baconsfield.

Since the City of Macon has declared in open court its legal inability to enforce the racial limitation as required by Covenant No. 2 on page 3 of the lease dated December 21, 1948, it is the feeling of the Board of Managers that the lease should be cancelled because of this breach by the City of that covenant.

Accordingly, I am writing this letter as a five day notice within the meaning of the final paragraph of the said lease, which said paragraph reads as follows:

[923]

Page 2. Ltr. to Mr. Merritt

May 19, 1964

"In the event that it breaches any of its covenants, numbered 1 to 4, inclusive, and fails to correct such breach within five days after written notice thereof, to the Mayor of the City of Macon, then the Board shall have the right to immediately terminate this contract, assume possession and control and management of the swimming pool and the pool area, in which event all rights of The City hereunder, except such rights as it may have with regard to the net revenue earned to the date of such termination, shall cease and determine."

The Board of Managers in pointing out this breach of the lease is fully aware that the City of Macon is guilty of neither bad faith nor neglect. Rather, it is obvious that performance by the City of the second covenant of the lease has been rendered impossible be decisions of the Supreme Court of the United States interpreting the Fourteenth Amendment, such decision having been handed down since December 21, 1948.

Respectfully yours,

WILLIS B. SPARKS, III

WBSIII:mbs

[924]

EXHIBIT "Y"

B. F. MERRITT, JR.
MAYOR

W. K. STANLEY, JR.
MAYOR PRO-TEM

City Hall
CITY OF MACON

May 28, 1964

Mr. Willis B. Sparks, III
Jones, Sparks, Benton and Cork
Attorneys-at-Law
Persons Building
Macon, Georgia 31201

Dear Mr. Sparks:

This will acknowledge receipt of notice given on behalf of the Board of Managers of Baconsfield of your intention to cancel the lease on the Baconsfield Swimming Pool to the City of Macon, unless the breach of said lease is corrected within five days from the receipt of said notice.

Correction of said breach is a legal impossibility and the City of Macon has no alternative but to consider your notice as an effective termination of said lease. Acting for and on behalf of the City of Macon, this will constitute notice that the City considers the lease effectively terminated immediately and its connection with the Baconsfield Swimming Pool severed. The property thus reverts to the control of the Board of Managers of Baconsfield free and clear of any lease agreement.

Sincerely,

B. F. MERRITT, JR.
B. F. Merritt, Jr., Mayor

BFM:b

[930]

IN THE SUPERIOR COURT OF BIBB COUNTY

(Title Omitted)

SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT
AS AMENDED—Filed August 21, 1967

Come now Guyton G. Abney et al as Successor Trustees under the Will of A. O. Bacon and Willis B. Sparks, Jr. et al as the "Sparks heirs" of the said Senator Bacon and tender this Supplement to the Motion for Summary Judgment of Guyton G. Abney et al as amended. The "Sparks heirs" have previously concurred in the original motion for summary judgment and do hereby concur in and adopt the "Amendment To Motion For Summary Judgment" filed on behalf of Guyton G. Abney et al as Successor Trustees on June 29, 1967, as well as joining in this Supplement.

By way of this "Supplement" the above named parties add the following evidence:

1. An affidavit of Alex Cameron, Clerk of the City of Macon, dated August 16, 1967, attached hereto as Exhibit "E"
2. An affidavit of Mrs. Kenneth Dunwoody dated August 21, 1967, attached hereto as Exhibit "F"
3. An affidavit of Wesley Holley Long, Jr. dated August 19, 1967, attached hereto as Exhibit "G"

/s/ JONES, SPARKS, BENTON & CORK
JONES, SPARKS, BENTON & CORK
Attorneys for the Heirs of
Senator Bacon and the Trustees
under his Will

[931]

EXHIBIT "E"**IN THE SUPERIOR COURT OF BIBB COUNTY**

(Title Omitted)

AFFIDAVIT

The following is a list of Mayors of the City of Macon, Georgia, from 1910 to 1967 with the years of service of each Mayor listed out beside his name.

John T. Moore	1910-1913
Bridges Smith	1914-1917
G. Glen Toole	1918-1921
Luther Williams	1922-1925
Wallace Miller	1925-1927
Luther Williams	1927-1929
G. Glen Toole	1929-1933
Herbert Smart	1933-1937
Charles L. Bowden	1937-1947
Lewis B. Wilson	1947-1953
B. F. Merritt, Jr.	1953-1959
Edgar Wilson	1959-1963
B. F. Merritt, Jr.	1963-1967

I, Alex Cameron, Clerk of the City of Macon, do certify that the above list of Mayors and of the dates of their service as such is an accurate reflection of the records in that

regard contained in my office. This affidavit is being given with the understanding that it is to be placed in evidence in further legal [932] proceedings in regard to Baconsfield Park and the contents of this affidavit are matters the truth of which I could swear to in open court if it were necessary.

This 16th day of August, 1967.

/s/ ALEX CAMERON

ALEX CAMERON

Clerk, City of Macon, Georgia

(City of Macon, Georgia Seal)

[935]

EXHIBIT "G"

IN THE SUPERIOR COURT OF BIBB COUNTY

[TITLE OMITTED]

AFFIDAVIT

I am Wesley Holley Long, Jr. I am a resident of Macon, Georgia living at 3380 Atkins Drive in that City. I am presently employed at Anderson Chemical Company in Macon. I served as Comptroller for the City of Macon from 1962 until December, 1966. My predecessor as Comptroller of the City of Macon was a Mr. Kelly Gunnells who was killed in an automobile accident in 1962. Prior to his death in 1962 Mr. Gunnells had served as Comptroller of the City of Macon for approximately twenty years.

During the time I served as Comptroller of the City of Macon I was aware that during at least a part of that time there was an outstanding lease of the Baconsfield Swimming Pool between the Board of Managers of Baconsfield as lessor and the City of Macon as lessee. While I was not completely familiar with the terms of this lease, which I knew had been in existence for several years prior to my taking office as Comptroller, I had read the lease and did know that the lease provided that if there was any profit made by the City from gate receipts to the Pool over and above the City's expenses for maintenance and operation of the Pool that the Board of Managers of Baconsfield was to be paid a part of that profit.

[936] It is my understanding as a result of my service as Comptroller of the City and my association with em-

ployees in that office some of whom had been there for several years before 1962, that the City of Macon had suffered an overall financial loss during the time it operated the Pool and indeed had suffered a loss each year the Pool was operated by the City in the sense that expenditures for upkeep and maintenance exceeded the proceeds of the paid admission of those who came to use the Pool.

During the term of my office as Comptroller of the City of Macon I had a request from a member of the Board of Managers of Baconsfield for a financial statement relative to the Pool as to whether any profit had been realized by the City in regard to the Pool since its construction. Such a completely accurate determination could not be made without a study of various City records but I recall notifying the Board after an extensive study of such records that no profit had been realized.

It is also my understanding from my service as Comptroller of the City of Macon that the City at no time during the term of the lease to the Pool ever paid any money whatever to the Board of Managers of Baconsfield pursuant to that provision of the lease which provided for a division of any profit between the City and the Board of Managers of Baconsfield.

I am giving this affidavit in order that it may be placed in evidence in further litigation in the above captioned case in regard to Baconsfield Park. I could and would, if necessary, swear to the truth of its contents in open Court.

[937] This 19th day of August, 1967.

/s/ WESLEY HOLLEY LONG, JR.
Wesley Holley Long, Jr.

Personally appeared before me the undersigned, an officer duly authorized to administer oaths, Wesley Holley Long, Jr. who having been placed under oath swears and affirms that the foregoing statement is true and correct in every respect. *

This 11th day of August, 1967.

WILLIS B. SPARKS, 3RD (L. S.) (N. P. Seal)
Notary Public
Bibb County, Georgia

[939]

(Title Omitted)

BIBB SUPERIOR COURT**SECOND SUPPLEMENT TO MOTION FOR
SUMMARY JUDGMENT AS AMENDED—Filed August 28, 1967**

Come now Guyton Abney et al as Successor Trustees under the will of the late A. O. Bacon and W. B. Sparks, Jr. et al as the "Sparks Heirs" of Senator Bacon, the time for filing evidence in this case having been informally extended by the Court from the time set at the hearing on June 29th so as to include the date of filing this document, and add the following evidence to their presentation:

1. An affidavit of Mrs. Mary Budd Kearnes with an attached letter from then City Comptroller Holley Long to Charles E. Newton, such affidavit being marked "Exhibit H".
2. A certified copy of the order of Bibb Superior Court in a Condemnation Case number 9865-M, such certified copy being attached hereto as "Exhibit I".
3. A certified copy of a lease between the Board of Managers of Baconsfield as lessor and Charles E. Nash as lessee appearing at Book 588 Pages 147-150 in the office of the Clerk of Bibb Superior Court, such certified copy being attached hereto as "Exhibit J".
4. A certified copy of an amendment to the lease filed as "Exhibit J", such amendment appearing at Book 588 Page 146 and said copy of said amendment being attached hereto as "Exhibit K".
5. A stipulation of Counsel in regard to "Exhibit H" to "INTERVENORS' SUPPLEMENTAL RESPONSE", such stipulation [940] attached hereto as Exhibit "L".

6. An affidavit of Ralph B. Jones identifying certain photographs as having been taken by him with an envelope attached containing the photographs so identified, such affidavit and photographs being attached hereto as Exhibit "M".

/s/ JONES, SPARKS, BENTON & CORK
JONES, SPARKS, BENTON & CORK
Attorneys for the heirs of
Senator Bacon and the Trustees
under his Will

[941]

EXHIBIT "H"

(Title Omitted)

AFFIDAVIT

I am Mrs. Mary Kearnes, an assistant trust officer of the First National Bank and Trust Company in Macon, Georgia. I am the same Mrs. Mary Kearnes who testified on deposition in this proceeding on April 24, 1967.

For several years Charles E. Newton, former Chairman of the Board of Managers of Baconsfield, served simultaneously as head of the Trust Department of the said Bank and as Chairman of the said Board of Managers during which years I worked under his direction in the Trust Department. Various records and checkbooks of the Baconsfield Board of Managers were kept at the Bank during that period because of Mr. Newton's connection with the Board and because the Trust Department performed certain bookkeeping functions for the Board. They are still kept there as of this date, the Bank having an agency agreement with the Board of Managers presently in force.

Mr. Charles E. Newton is not presently discharging any duties at the Bank having been largely confined to his home for over a year by ill health after suffering what a layman might term a "stroke".

Through my work as an assistant to Mr. Newton I have become familiar with the set of check books he kept with regard to the Baconsfield Board of Managers. I know of my personal knowledge that these records which extend back from the present day until a time before the construction of the Baconsfield swimming pool in 1947 or 1948 re-

fleet all receipts of income, the sources of said income and the connection in which said payments were made.

[942] At the request of Mr. Willis B. Sparks, III of Counsel for the heirs of Senator Bacon and the trustees under his will I have just completed a thorough review of the said records and can attest that they do not reflect any payment to the Board of Managers of Baconsfield by the City of Macon at any time or in any year made pursuant to the terms of the lease of the said pool by the Board to the City dated December 21, 1948, by which the Board in a clause on page 3 of the lease was to have received fifty percent of any profit made by the City over and above the City's expenses for operation and maintenance of the said pool. On the basis of my review of these records I can testify with certainty that the City never made any such payment in any amount to the Board of Managers of Baconsfield. This, I believe, is also corroborated by the financial statements incorporated in the minutes of the Board of Managers which statements, I believe, fail to reflect any payment by the City to the Board pursuant to the pool lease.

Attached to this affidavit is the original of a letter dated September 26, 1963, to "Mr. C. E. Newton, Jr." as "Chairman, Board of Managers of Baconsfield" from Mr. Holley Long as Comptroller of the City of Macon. The letter is three pages in length including a final page consisting of a listing of revenue and expenditures in connection with the City's operation of Baconsfield Pool year by year from 1948 through 1962. The "Mr. C. E. Newton, Jr." referred to is the same person elsewhere referred to herein as Mr. Charles E. Newton.

This original letter is one kept by the Trust Department of the First National Bank in the regular course of its business.

This letter by its terms is one written in reply to letters to Mr. Long by Mr. Newton dated April 3, 1963, and July 3, 1963. I have been unable to locate the copies of these two letters written by Mr. Newton in the Bank's files.

[943] This affidavit with the accompanying letter of then Comptroller Holley Long are given in order that they may be placed in evidence in the above captioned case i.e. in further legal proceedings in connection with Baconsfield.

I do swear and affirm that the contents of this affidavit are true and correct in every respect and that I could and would, if it were necessary, swear to the truth of these contents in open Court.

This 25th day of August, 1967.

/s/ MRS. MARY KEARNES (L.S.)
Mrs. Mary Kearnes

Personally appeared before me an officer duly authorized to administer oaths Mrs. Mary Kearnes who having been placed under oath does swear and affirm that the contents of the foregoing affidavit are true and correct in every respect.

This 25th day of August, 1967.

/s/ MARY HESTER RICHARDSON (N. P. Seal)
Notary Public,
Bibb County, Georgia

[944]

CITY HALL
 CITY OF MACON
 GEORGIA

ED WILSON
 MAYOR

DAN TIDWELL
 MAYOR PRO-TEM

September 26, 1963

Mr. C. E. Newton, Jr. Baconsfield File
 Chairman, Board of Managers of Baconsfield
 First National Bank & Trust Company
 Macon, Georgia

Dear Mr. Newton:

This letter is in reply to your letters of April 3, 1963 and July 3, 1963, requesting information concerning revenues and expenditures at Baconsfield Pool.

Attached you will find a table showing revenues and expenditures for each year, 1948-1962. The information shown on this table includes total revenues from all sources. The expenditures on this table indicate routine expenditures for salaries of personnel employed exclusively in the pool operation and for minor repairs and general operation of the pool.

The annual expenditures shown do not include many other items, such as capital expenditures for improvements. For instance, we had the following expenditures for improvements in the years indicated:

1948	\$4,999.57
1960	6,079.21
1962	6,360.55
<hr/>	
	\$17,439.33

There are many other expenditures which would require a more detailed analysis of city audits to develop specifically. These expenditures include such items as locker rental (the revenues shown include revenue from renting lockers to the public) and charge-outs for extensive work performed by the general labor [945] force of the city.

In my opinion, on the basis of figures already in hand and on the basis of known expenditures not specifically accounted for without a more detailed audit, the pool has shown a net loss since 1948. If you feel that you would require further detailed information, we will continue to develop items of cost other than those outlined in this letter and on the enclosed table, but I am confident that expenditures will considerably exceed revenues for the period 1948-62. Of course, I will be happy to meet with you to discuss the matter or to go over our books with your accountant, if you think this will be helpful.

Sincerely,

HOLLEY LONG
Holley Long, Comptroller
City of Macon

HL:mg

[946]

BACONSFIELD POOL

	<i>Revenue</i>	<i>Expenditures</i>
1948	\$ 4,407.20	\$ 4,407.20
1949	9,304.10	8,210.54
1950	10,068.80	13,341.22
1951	9,837.52	9,904.81
1952	13,163.90	11,359.90
1953	11,201.75	11,119.35
1954	12,649.45	12,040.17
1955	10,914.95	10,733.79
1956	12,037.70	10,118.98
1957	12,276.85	11,550.69
1958	12,599.26	10,183.22
1959	14,748.09	11,001.34
1960	14,253.95	7,130.12
1961	14,551.75	8,249.23
1962	12,765.88	8,118.33
	<hr/> \$174,781.15	<hr/> \$151,150.56

[947]

EXHIBIT "I"**IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA****[TITLE OMITTED]****ORDER**

Pursuant to the Return of Honorable T. Coleman Bloodworth, the Special Master appointed and chosen by the Court to hear evidence and make an award in the above captioned matter, in which said Return an award was made to the condemnees in the sum of \$131,000.00; and said amount having been paid into the Registry of the Court.

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that said award be and the same is hereby made the decree of this Court.

The Clerk of this Court is hereby directed, pending a final judgment in the case of Charles E. Newton, Jr., et al v. City of Macon, being Case No. 25864 in the Superior Court of Bibb County, Georgia, and upon which a final order in this Court was entered on the 10th day of March, 1964, to deliver said sum unto Mr. C. E. Newton, Jr., in his capacity as Chairman of the Board of Managers of Baconsfield, petitioners in said Case No. 25864; and said C. E. Newton, Jr., in said capacity, is hereby directed to invest said funds in short-term United States Government securities—all to be held subject to the further order of this Court.

[948]

So ORDERED, this 26 day of March, 1964.

O. L. LONG
J.S.C.M.C.

FILED IN OFFICE,
26 day of March 1964
LILLIAN LAVINE
Deputy Clerk

[949]

EXHIBIT "J"

588/147

Recorded, Oct. 20, 1948

GG

GEORGIA BIBB COUNTY

THIS CONTRACT, made and entered into the 17th, day of October, 1947, by and between the Board of Managers of Baconsfield, hereinafter called Lessor, the first party, and Charles E. Nash, of Bibb County, Georgia, hereinafter called Lessee, the second party,

Witnesseth:

That Lessor, in consideration of the rental herein agreed to be paid by Lessee, and of the other covenants and agreements, as hereinafter set out, does hereby demise, lease and grant unto Lessee, upon the terms and conditions hereinafter set forth, and for the period of time designated, the following described real estate, to-wit:

Description of Property:

All that tract of parcel of land situate and being in the East Macon District of Bibb County, Georgia, and in that tract of land known as "Baconsfield", devised to the City of Macon by A. O. Bacon in his last will and testament, which is on file and of record in the office of the Ordinary of Bibb County, Georgia, and which is more fully described as being that part of Baconsfield bounded on the southeast by Emery Highway, formerly Broad Street; on the north west by Boulevard Baconsfield, sometimes referred to as Spring Street, and sometimes as North Avenue; and on the east by a forty (40) foot street which extends [950]

For Transfer to Corp. of Mercer University

See Book 552 Page 671

...day of Sept. 1953

For transfer & cancel

see Book 552 page 673

Sept 15—1953 B. a.... D. C.

DEED RECORD Book 588, BIBB COUNTY, GEORGIA

[950] northerly from Emery Highway to Boulevard Baconsfield, all as will more fully appear by reference to a blue print copy of a map made by E. L. Gostin, C. E., on Dec. 3, 1945, hereto attached as Exhibit "A" and by reference made a part hereof. *

Term of Lease.

This lease shall begin on the date upon which possession of said premises is delivered to Lessee and shall extend for a period of ten (10) years from that date.

Delivery of Possession

Within a reasonable time after execution of this lease, and as soon as Lessor can have the buildings now on the demised premises vacated, Lessor will deliver possession of the premises to Lessee. All buildings now on the premises shall then become the absolute property of Lessee except the Fruit Stand now occupied by Bowen. Lessee agrees that he will, as soon after delivery of possession as possible, and within a reasonable time, remove all buildings now located on the premises except the Bowen Fruit Stand which shall be removed by Lessor.

GRADING OF PREMISES:

LESSEE Covenants and agrees that immediately upon being delivered possession of said premises, he will under-

take to grade that portion thereof designated upon said blue print as "Ravine", that being all of said tract lying between the "Brow of hill", as indicated upon said plat, and the said forty (40) foot street. In grading or filling the said ravine Lessee shall construct, or cause to be constructed, a culvert, or sewer, either of concrete or other suitable material, over the branch which extends under Boulevard Baconsfield through the said ravine to Broad Street, of sufficient size to carry off all water which ordinarily drains and all flood waters which occasionally drain down said branch. The grading shall consist of filling the said ravine to the level of Boulevard [951] Baconsfield and thence grading same down to the level of Broad Street, and shall be so constructed that when the forty (40) foot street is graded and opened, the grade of the property demised shall be even with the grade of such forty (40) foot street as constructed on an invarying grade between Broad Street and Boulevard Baconsfield.

The cost of removing said buildings (except the Bowen Fruit Stand) and of such grading shall be borne by Lessee. In consideration of Lessee bearing this expense, Lessor contracts and agrees that it will credit Lessee with fifteen months rental (amounting to \$3375.00) which shall accrue as the first maturing monthly rentals under the terms of this lease.

RENTAL:

Lessee agrees to pay as rental for said demised premises the sum of Two Hundred Twenty Five and 00/100 (\$225.00) Dollars a month for each and every calendar month during the period of this lease, but beginning 90 days after delivery of possession to the Lessee, the same to be paid in advance on or before the 10th, of each month, the rentals for the month in which the term begins and the month in

which the term ends to be prorated according to the number of days in such month.

Use of Premises:

Said premises are to be used by Lessee for the purpose of conducting thereon, or allowing to be conducted thereon, a first class, shopping center. No manufacturing business and no garage for the repair of automobiles shall be conducted upon said premises, nor shall any spirituous or malt beverages be sold thereon, nor any skating rink or dance hall conducted thereon.

In defining the use to which these premises can be put, it is the intention of the parties to provide that no business or operations shall be carried on therein which will be offensive or obnoxious.

[952] IMPROVEMENTS BY LESSEE

The title and ownership of such buildings as maybe erected on the demised premises shall be as follows:

If this lease should not be renewed, as herein provided, at the end of the original term, or at the end of the first 10 year renewal term, then in either of these events all buildings erected by Lessee, his assigns or sub tenants, upon the demised premises, shall be and become a part of the land and revert to Lessor upon reversion of the land; but if this lease should be renewed for both the first and second renewal periods of 10 years each by Lessee or his assigns, then and in that event the buildings shall not become a part of the land but may be removed by lessee or his assigns at any time within a period of four months after the expiration of 30 years from this date, upon the payment by Lessee of \$2500.00 in cash for this privilege; and in the event of removal of the buildings

by Lessee, he shall be obligated to clear the premises and leave the land in good order clear of all debris within the period of four months. If the buildings are not removed within the four months period they are to become a part of the land and revert to Lessor upon reversion of the land.

Insurance:

Lessee contracts and agrees at his own expense to keep all improvements upon said premises fully insured against loss and damage by fire and windstorm, by taking out extended coverage insurance "in the usual form, to the approximate insurable value of such improvements, in all of which policies Lessor and Lessee are to appear as the named insureds as their interest may appear, and to cause to be furnished to Lessor certificates of all such policies. In the event of damage to or destruction of any improvements upon said premises [953] occurring during the term of this lease or during any renewal term, hereinafter provided for, then Lessee agrees to immediately repair, rebuild and replace all such damaged or destroyed improvements, with improvements of equal value. Lessor agrees that the proceeds of all such insurance policies may be so applied.

Release from Liability

Lessee will make all repairs of every kind to the buildings and improvements and Lessor is released and relieved from any obligation to make such repairs. Lessor is also released and relieved from any and all obligations to pay for any city services and from any liability for taxes imposed against the demised premises; and is released and relieved from any obligation to see that all city ordinances and regulations are complied with.

Lessee hereby released Lessor from any and all liability for injury to person or property however the same may

arise during the term of this contract, and covenants to indemnify Lessor against any loss or damage which it may sustain on account of any such injury or damages.

BANKRUPTCY

In the event Lessee shall be adjudicated a bankrupt, or should a receiver be appointed for Lessee, or any of his property, then Lessor shall have the option to terminate this contract immediately and to at once take possession of the demised premises with all improvements thereon, without any liability to Lessee, or to his trustee in bankruptcy, or to such receiver, for any unamortized value or cost of such improvements, and without any liability of such Lessee, or such Lessee, or such trustee or receiver for rental after the date upon which possession is so taken.

WAIVER OF HOMESTEAD AND ATTORNEYS FEES

Lessee hereby waives and renounces for himself and family [954] any and all homestead and exemption rights, which he or they may have under or by virtue of the laws of Georgia and of the United States as against any liability that may accrue under this contract.

Lessee further agrees to pay 10% attorneys fees on any part of said rental that may be collected by suit or by an attorney after the same has become due as provided by law.

ASSIGNMENT AND SUBLETTING

This contract is assignable and Lessee may sublet all or any portion of the demised premises and of any improvement which may be constructed thereon but all assignees and all statements shall hold subject to all of the terms, provisions and conditions of the contract.

After buildings and improvements to the value of at least \$50,000.00 shall have been erected on the demised

premises, Lessee may transfer and assign all his interest in this lease contract to a corporation and in that event and upon such corporation's assumption by proper corporate action, of this lease and of all and singular, the duties, obligations and liabilities herein imposed upon Lessee, Lessor will accept such corporation as its lessee and release Lessee (the lessee named herein) from all future liability under this lease, such transferee or assignee thereafter to hold under and subject to all other terms, provisions and conditions of this lease.

DEFAULT BY LESSEE

It is agreed that if as many as two installments of rent herein contracted to be paid by Lessee shall be in arrears at any one time, or if the Lessee shall fail to perform any of the terms covenants and conditions hereof, and such default continue after thirty days written notice to pay or perform be served upon Lessee, then Lessor, if it so elects, may enter upon said premises, and repossess and enjoy the same as though this lease had not been made and without any accountability to Lessee for any unamortized value or cost of any improvement upon sold premises.

In the event possession is taken by Lessor because of default, as herein provided, whether through legal proceedings or otherwise, such repossession [955] shall not be considered as relieving Lessee from his obligation to pay the rent up to the date upon which possession was so taken and further in such event, Lessee shall have no further right, title or interest in and to such demised premises, and this contract shall be considered as terminated.

These rights of Lessor are cumulative and are not restrictive of any other rights which Lessor has under the

law, and failure of these privileges at any particular time shall not be construed to constitute a waiver thereof.

REQUIREMENTS AS TO NOTICE

The mailing of a letter or other written notice addressed to Lessee at 431 Nottingham Drive Macon, Georgia, or the direct delivery of any such letter or written notice to Lessee, shall be a sufficient compliance by Lessor with any requirement as to a written notice herein provided for, such notice to be deemed as given at the time of such mailing or such personal delivery. It is provided, however, that Lessee shall have the privilege of designating an agent resident of the City of Macon to so receive a copy of any such notice, with the further privilege of changing from time to time the address to which such notice shall be mailed to Lessee and of changing from time to time the agent upon whom such copy shall be so served.

[956]

RENEWALS:

So long as Lessee is not in default hereunder, either as to the payment of rental, or as to compliance with any of the terms, provisions and covenants of this lease, Lessee shall have the privilege at any time prior to the expiration of the ninth year of the term of this lease, of renewing the same for an additional period of ten years, at the same rental, and upon the same terms, conditions and provisions as herein provided for; and likewise, shall have the additional privilege during the first nine years of such renewal term of so renewing this lease for an additional such ten year period. No such option to renew, however, shall extend beyond the second renewal term of ten years, so this lease cannot be extended beyond a period of thirty

years from the date upon which the same begins except by a new agreement between the parties.

COVENANT OF PEACEABLE POSSESSION

LESSOR covenants with Lessee that it has the right to lease the premises for the term and upon the conditions herein specified and that Lessee on paying the said Rental and upon keeping and performing the covenants herein specified by him to be kept and performed, may and shall peaceably and quietly have, hold and enjoy the said demised premises for the term hereinabove specified and for the two additional renewal terms in the event of the exercise of the options to renew as hereinbefore provided.

SUCCESSORS AND ASSIGNS:

This contract in its entirety shall bind the successors in office of the first party and the heirs, executors, administrators, successors and assigns of the second party.

APPROVAL BY ATTORNEYS FOR LESSEE

The title of Lessor and its power and authority to make this lease shall be subject to approval by attorneys for Lessee, [957] and if in the opinion of Lessee's attorney it is necessary to have any court order to perfect title or to authorize the making of the lease, such order shall be obtained by Lessor. In the event Lessor is unable to obtain such order of court as may be required by Lessee's attorney after making a reasonable effort to do so then this lease shall be void, and of no further force or effect and neither party hereto shall be under any further duty, obligation or liability to the other hereunder or in reference hereto.

In Witness Whereof, the parties hereto, Lessor (acting by and through its officers duly authorized by its resolu-

tion), have hereunto set their hands and affixed their seals,
the day and year first above written.

BOARD OF MANAGERS OF BACONSFIELD (seal)

By: Dr. W. G. Lee
Chairman of the Board

Attest: C. E. Newton Jr.
Secretary of the Board

Lessor:

Charles E. Nash (seal)
Lessee

Signed, sealed and delivered by Lessee in
the presence of:

Rosa B. Morgan
Celia S. Lucas (N. P. Seal)
Notary Public, Ga., State at Large.
Plat recorded in
Plat Book 20, Folio 32
(C.G.) (2-28-50)

Signed, sealed and delivered by Lessor in
the presence of:

Rosa B. Morgan
Celia S. Lucas (N. P. Seal)
Notary Public, Ga.
Notary Public, Georgia, State at Large
My Commission expires January 20, 1950
Filed in Office: Oct. 20, 1948 at: 9 A.M.

Recorded, Oct. 21, 1948

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[959]

EXHIBIT "K"

Book 588, Page 146

This Contract, made and entered into the 30th day, of March, 1948, by and between the Board of Managers of Baconsfield, hereinafter called Lessor, the first party, and Charles E. Nash, of Bibb County, Georgia, hereinafter called Lessee, the second party,

Witnesseth:

That for and in consideration of the mutual agreements of the parties, and the mutual benefits to accrue to both, the parties hereto do hereby amend and modify the Lease agreement entered into between them on October 17, 1947, in the following particulars, to-wit:

Any and all Sub-Lessees of Chas. E. Nash, who so desire, may submit to Lessor herein a copy of his sublease and a copy of his building plans and specifications, for approval. As to any and all such Sub-Lessees whose lease, plans and specifications have been so approved by this Lessor, the following rights and privileges shall be available;

[960]

DEED RECORD BOOK 588 BIBB COUNTY GEORGIA

Insurance:

The interest of this Lessor in all insurance policies issued on the improvements which may be built upon said premise shall, so long as this lease is in full operation and effect, be subordinate to the interest of the Lessee herein or to any Sub-Lessee, or the assignees of either, only to the extent of such funds as may be used in the erection, improvement or rebuilding of improvements located on said premises; and on the further condition that the proceeds

of any such insurance policies shall be used by the Lessee, any Sub-Lessee, or any assignee of either, for repairing, rebuilding or replacing such improvements as may have been damaged or destroyed. Nothing herein provided shall prevent the interest of the Lessor herein from being paramount, in such insurance policies, in the event the title to said improvement has, at the time they are destroyed, or before they are re-built, become vested in the Lessor under the provisions of this lease.

ACCEPTANCE OF SUB-LESSEES IN EVENT OF DEFAULT BY LESSEE

In the event the lease should be terminated, as provided therein, either because of the bankruptcy of the Lessee, or because of default in the payments of rent by the Lessee or for any other reason as provided in said lease, or should the Lessee fail to exercise any right of renewal granted in said lease, the Lessor herein agrees that it will accept as its immediate Lessee and tenant, each of the Sub-Lessees who may at that time hold leases or assignments from the Lessee herein, and whose sub-lease has been approved as aforesaid, and be governed by the terms of such sub-leases as to the property covered by such sub-leases.

REQUIREMENTS AS TO NOTICE:

Lessor agrees that they will give to every Sub Lessee whose lease has been so approved, at his last known address, notice of any termination or failure of renewal of its lease with Mr. Charles E. Nash, and give such Sub-Lessee an opportunity to be and become an immediate tenant and Lessee of this Lessor, under the terms and provisions of such sub lease.

[961] It is understood and agreed that, except as hereinabove changed and modified, the original lease between

these parties entered into October 17, 1947, shall stand un-
changed and of full force and effect.

In Witness Whereof, the parties hereto, Lessor (acting
by and through its officers duly authorized by its resolu-
tion), have hereunto set their hands and affixed their seals,
the day and year first above written.

Board of Managers of
Baconsfield (Seal)
By: DR. W. G. LEE,
Chairman of the Board

Attest: C. E. NEWTON
Secretary of the Board

Lessor CHAS. E. NASH
(Seal)
Lessee

Signed, sealed and delivered by
Lessor in the presence of:

ROSA B. MORGAN
CELIA S. LUCAS (N. P. Seal)
Notary Public, Ga., State at Large

Signed, sealed and delivered by
Lessee in the presence of:

JOHN E. WATSON
CELIA S. LUCAS (N. P. Seal)
Notary Public, Ga., State at Large
Filed in Office: Oct. 20, 1948 at: 9 A.M.

Recorded, Oct. 29, 1948

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[963]

EXHIBIT "M"**BIBB SUPERIOR COURT****CASE No. 25864****CHARLES E. NEWTON ET AL.,****v.****CITY OF MACON ET AL.****AFFIDAVIT**

I am Ralph B. Jones. I am now and have been for thirty-five years a professional photographer. For nineteen years I have been associated with Drinnon, Inc., a corporation engaged in the business of photographs and photographic engravings with a place of business at 481 Broadway in Macon, Georgia. I am presently Vice President of Drinnon, Inc. and manager in charge of photography.

During the latter part of August, 1967, I was requested by attorney Willis B. Sparks, III to take some photos of the Baconsfield swimming pool and surrounding area and of a marker which is located in the park area of Baconsfield. Such photographs were taken by me pursuant to that request and from unretouched negatives a series of prints was made at Drinnon, Inc. at its office at 481 Broadway, Macon, Georgia.

On the back of each print appears the name "Drinnon, Inc." and my own name, which language serves to identify the photographs taken as those described above.

It is my understanding that this affidavit and the photographs herein described are to be placed in evidence in further proceedings in the above captioned case.

/s/ **RALPH B. JONES**

[964] I could and would, if it were necessary, freely testify under oath in open court to the truth of the facts contained in this affidavit.

/s/ RALPH B. JONES
Ralph B. Jones

Personally appeared before me an officer duly authorized to administer oaths Ralph B. Jones, who having been placed under oath does swear and affirm that the foregoing affidavit is true and correct in every respect

(Illegible) (N. P. Seal)
Notary Public

My Commission Expires Jan. 19, 1968
Bibb County, Georgia

[965]

ATTACHMENT TO EXHIBIT "M"

(See Opposite) 

BACONSFIELD

DEVISED TO THE CITY OF MACON BY
AUGUSTUS OCTAVIUS BACON

UNITED STATES SENATOR FROM GEORGIA 1894 — 1914
AND CHAIRMAN OF ITS FOREIGN RELATIONS COMMITTEE AND
PRESIDENT PRO TEM FROM 1912 TO DATE OF HIS DEATH.

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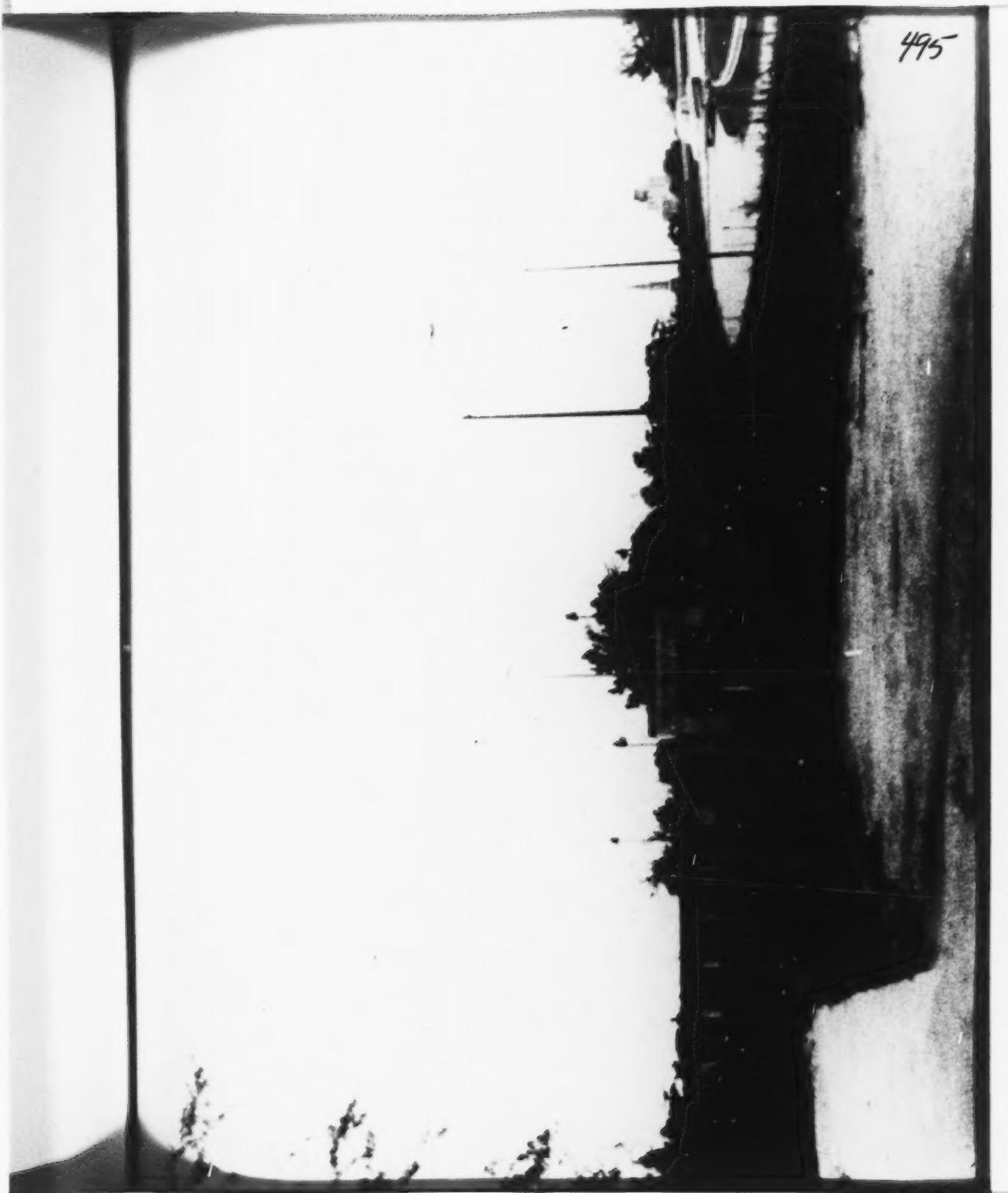
THIS TRUST FOR THE SOLE, PERPETUAL AND UNENDING USE
BENEFIT AND ENJOYMENT OF THE WHITE WOMEN, WHITE
BOYS AND WHITE CHILDREN OF THE CITY OF
MACON, TO BE BY THEM FOREVER USED AND ENJOYED AS A
PARK AND PLEASURE GROUND, SUBJECT TO THE RESTRICTIVE
GOVERNMENT MANAGEMENT, RULES AND CONTROL OF
THE BOARD OF MANAGERS . . . I AM MOVED TO MAKE
THIS BEQUEST BY MY GRATITUDE TO AND LOVE OF THE
PEOPLE OF THE CITY OF MACON . . . AND ESPECIALLY AS
A MEMORIAL TO MY EVER LAMENTED AND ONE SONS, LAMAR
BACON, WHO DIED ON THE 21ST DAY OF DECEMBER IN THE
YEAR 1884 AND AUGUSTUS OCTAVIUS BACON, JR. WHO
DIED ON THE 27TH

494

[966]

(See Opposite) 

495-



496

[967]

(See Opposite) 

497



498

[968]

(See Opposite) 





[975]

THE SUPERIOR COURT FOR THE
COUNTY OF BIBB
STATE OF GEORGIA

(Title Omitted)

RESPONSE BY ATTORNEY GENERAL TO
MOTION FOR SUMMARY JUDGMENT—filed November 1, 1967

COMES Now ARTHUR K. BOLTON in his official capacity as Attorney General of the State of Georgia and pursuant to his role as specified in Georgia Code Annotated, Section 108-212 (Ga. L. 1952, pp. 121, 122, as amended by Ga. L. 1962, p. 527) after having been made a party in the above captioned matter and files this his Response to the petition in the above matter saying:

That he is not desirous of filing any pleadings in this above captioned matter as outlined in the Order issued July 21, 1967 by Honorable O. L. Long, Judge, Superior Courts, Macon Judicial Circuit, making the Attorney General a Party to this case nor is he desirous of requesting future oral hearing or argument; however, as parens patriae in all legal matters pertaining to the administration and disposition of charitable trusts in the State of Georgia in which the rights of beneficiaries are involved, he respectfully files this his response on behalf of said parties saying:

That a review of the voluminous material presented him by both parties to the proceeding shows the following salient facts, to wit:

In 1911 U. S. Senator Augustus O. Bacon executed a Will devising to the mayor and council of the City of

Macon a tract of land which, at the death of his wife and daughters, [1976] was to be held "in trust for the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground." The Will specified that the park should be under the control of a Board of Managers consisting of seven (7) persons all of whom were to be white. The park was operated on a segregated basis until 1963 when Negroes were allowed to use the facilities.

In 1963 Charles E. Newton and other members of the Board of Managers of the Park brought an equitable petition against the City of Macon as trustee of the park property and Guyton G. Abney and others as trustees for the residuary beneficiaries. The petition alleged that the City was failing and refusing to enforce the provisions of the Will with respect to the exclusive use of the park and that such conduct constituted a violation of trust so as to require its removal as trustee. The prayer asked that the City be removed as trustee and another trustee be appointed in its place. The City answered that it was unable to maintain the racial bearers imposed under the Will and prayed that the court construe the Will and enter a decree setting forth the duties and obligations of the City in the premises. Rev. E. S. Evans and other Macon Negroes intervened in opposition to the removal of the City as trustee and prayed that the court effectuate the general charitable purpose of the testator to establish and endow a public park by refusing to appoint private persons as trustees. In its order, the Superior Court of Bibb County accepted the resignation of the City of Macon as trustee and appointed three (3) private citizens to serve in its stead.

Alleging that the decree of the trial was "patent enforcement of racial discrimination contrary to the equal

protection clause of the Fourteenth Amendment," the Negro intervenors appealed to the Georgia Supreme Court in *Evans v. Newton*, 220 Ga. 280. In a full bench decision affirming [977] the action below, the court held: (1) the City of Macon had a right to resign as trustee; (2) since Ga. Code § 108-302 provides that a trust shall never fail for a want of a trustee, the court had a right to appoint successor trustee; (3) under Ga. Code § 69-504 Senator Bacon had the absolute right to give and bequeath property to a limited class; (4) the *cy pres* doctrine (§ 108-202) could not be applied since it was not invoked by either of the primary parties of interest to the case. However, even if the intervenors could have raised the issue, the facts before the trial judge were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of the exact execution and the exact manner provided by the testator.

The case went by certiorari to the U. S. Supreme Court which by a 6-3 decision reversed the Georgia Supreme Court. *Evans v. Newton*, 382 U.S. 296. The ambiguity of the majority's six (6) page opinion is amply evidenced by the eleven (11) pages of dissent which follow.

Speaking for majority, Mr. Justice Douglas stated that the court would assume for the sake of argument that no constitutional prohibition would have arisen had the property originally been left in the hands of private trustees. He went on to say:

"This park, however, is in a different posture. For years it was an integral part of the City of Macon's activities. From the pleadings, we assume it was swept, manicured, watered, controlled and maintained by the City as a public facility for whites only, as well as granted tax exemption under Ga. Code Ann.

§ 92-201. The momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees. So far as this record shows, there has been no change in the municipal maintenance and concern over [1978] the facility. Whether these public characteristics will in time be dissipated is wholly entwined in the management or control of the park, it remains subject to the restraint of the Fourteenth Amendment. . . . We hold only that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector. . . .

"Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under State law. We may assume that had the Georgia courts been of the view that even in private hands the park may not be operated for the public on a segregated basis, the resignation would not have been approved and private trustees appointed. We put the matter that way because on this record we cannot say the transfer of title *per se* disentangled the park from segregation under the municipal regime that long controlled it."

Id. at 301-02.

A special concurrence by Mr. Justice White at page 304 makes reference to the possibility of a receiver to the residuary beneficiaries:

"It must be as clear to the City as to this court that if the City remains 'entwined in the management or control of the park, it remains subject to the re-

straint of the Fourteenth Amendment,' *ante*, page 301; and should segregation in the park be barred, the residuary beneficiaries would undoubtedly press their claim that failure of the trust purpose expressed in the racial restriction results in reversion of the park property."

[979] However, in his dissent at page 314, Mr. Justice Black states that the majority's holding might well preclude the State courts from declaring that the property had reverted to the residuary beneficiaries:

"The ambiguous language used by the Court even cast doubt upon Georgia's power to hold that the trust property here can revert to the heirs of Senator Bacon if the conditions upon which he created the trust should become impossible to carry out. The heirs of Senator Bacon raised the issue of reversion below, but neither court reached it. So far as I have been able to find, the power of the State to decide such a question has been taken for granted in every prior opinion this Court has ever written touching this subject. I believe that Georgia's complete power to decide this question is so clear that no doubt should be cast on it as I think the Court's opinion does. But if this Court is to exercise jurisdiction in this case and hold, despite the fact that the State court's decree did not adjudicate any such question, that the new successor trustees cannot constitutionally operate the park in accordance with Senator Bacon's Will, then I think the Court should explicitly state that the question of reversion to his heirs is controlled by State law and remand the case to the Georgia Supreme Court to decide that question."

Upon remand, the Supreme Court of Georgia in *Evans v. Newton*, 221 Ga. 870, stated that since the City of Macon

had resigned as trustee and since the order of the trial court appointing a new trustee had been reversed, the trust property was without a trustee. The court left little doubt that in its opinion the trust property should revert to the residuary devises:

[980] "Even if new trustees were appointed, they would be compelled to operate and maintain the park as to Whites and Negroes on a non-discriminatory basis which would be contrary to and in violation of the specific purpose of the trust property as provided in the Will of Senator Bacon.

"Under these circumstances, we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated. [See Restatement (Second), Trusts § 335. 'Where a trust is expressly created . . . (and) fail(s) from any cause, a resulting trust is implied for the benefit of the grantor, or testator or his heirs.' Code § 108-107(4)]. . . .

"As we view the status of the case, in light of the United States Supreme Court decision, direction is given that the court on the return of the case determine and pass upon the contentions of the trustees of the Bacon estate and intervening heirs and such other questions as may be properly raised by the parties."

The matter is once again before the Bibb Superior Court on a motion for summary judgment filed by the successor trustees under the residuary clause of Senator Bacon's Will. They claim that the property reverted on January 17, 1966—the date the United States Supreme Court reversed the decision of the Georgia Supreme Court—and pray that the court give effect to said reversion of title.

To this motion, the Negro intervenors have thus far filed four (4) responses with twenty-six (26) exhibits attached. The exhibits tend to show that substantial sums of federal and municipal funds, including WPA money, have been expended on the park. In essence, their contentions [981] appear to be three-fold: (1) § 69-504, which allows a settlor to devise to a municipality a park in trust for the use of one race only, is unconstitutional; (2) since the racial limitation in the Will is unconstitutional, the *cy pres* doctrine (§ 108-202) should be applied so that the trustees could operate the park on a non-racial basis; (3) for the courts to declare a reversion would be in violation of *Shelley v. Kramer*, 334 U.S. 1; (4) that a "dedication" has taken place with regard to the park property and should be so declared by the Court.

On July 21, 1967 the Attorney General was made a party to the proceeding by an Order issued by Honorable O. L. Long, Judge, Superior Courts, Macon Judicial Circuit. On August 7, 1967 the Attorney General acknowledged service of the Order making him a party to the case and expressly waived further service or notice in regard to said Order and the specified materials therein.

DISCUSSION

Georgia Code Annotated, Section 108-212 provides as follows:

"In all cases in which the rights of beneficiaries under a charitable trust shall be involved, the Attorney General of the State of Georgia shall, in his official capacity, or the solicitor general of the circuit wherein the major portion of trust res lies, represent the interests of such persons and the interests of the State of Georgia as *parens patriae* in all legal matters

pertaining to the administration and disposition of such trusts; and, in this capacity, he may sue or be sued, and, insofar as a suit of this nature may be deemed a suit against the State, the State of Georgia expressly gives its consent to suit; the venue of such [982] suits may be in any county in the State where a substantial number of persons who are the beneficiaries of said trusts shall reside. Process shall be directed to the Attorney General of the State of Georgia, in his official capacity, or the solicitor general of the circuit wherein the major portion of trust res lies. Service may be perfected by mailing a copy of the petition and process by the clerk of the superior court wherein it is filed to the Attorney General or the solicitor general of the circuit wherein the major portion of trust res lies and by his entry of his action upon the issue docket, and it shall be the duty of said clerk to do the acts herein stated instanter upon the filing of the petition. Any judgment determining rights under any charitable trusts shall be binding on the beneficiaries when the Attorney General or the solicitor general of the circuit wherein the major portion of trust res lies is a party and is served as herein provided."

Under the above cited code provision it is incumbent upon the Attorney General's Office as *parens patriae* to contest the reversion of the property in question. First of all we feel that the transfer of Baconsfield to the City of Macon for the use and benefit of the "white women and children of Macon" did not constitute a dedication of the property. Dedication contemplates retention of the fee interest by the owner of the property. As to what constitutes a dedication see *Mayor & City of Macon v. Franklin*, 12 Ga., 239; *Parsons v. Trustees Atlanta University*, 44 Ga. 529; *Bayard v. Hargrove*, 45 Ga. 342; *Brown v. Gunn*, 75 Ga. 441;

Davis v. East Tenn., Va. & Ga. Railway Company, 87 Ga. 605; *Pettit v. Mayor of Macon*, 95 Ga. 645(2); *Georgia Railroad & Banking Company v. City of Atlanta*, 118 Ga. 486, 489; *Brown v. City of East Point*, 148 Ga. 85; *Dunaway v. Windsor*, 197 Ga. 705; and *State Highway Department v. Alexander et al.*, 222 Ga. 354.

[983] In the case at bar Senator Bacon in Article IX of his Will devised, by remainder limitation,

"All right, title interest in and to said property hereinbefore described and bounded, *both legal and equitable*, including all remainders and reversions and every estate in the same of whatsoever kind . . ." (Emphasis added.)

to the mayor and council of the City of Macon. The City of Macon, in its capacity as trustee, obviously could not dedicate the property to a use inconsistent with the trust. See *Brown v. City of East Point*, *supra*. Nor do we believe that the expenditure of tax funds by the City of Macon for the upkeep of the park would constitute a dedication. See *Daniels v. The Town of Athens*, 55 Ga. 609 (1876).

The essentials of a dedication to public use are an offer, either express or implied by the owner, and an acceptance of the use of the land by the public or by the public authorities. For the dedication to be valid, there must be an intention on the part of the owner to dedicate his property to public use. See *Hyde v. Chappell*, 194 Ga. 536; *Hudspeth v. County of Early*, 210 Ga. 386, and *Nelson v. Girard*, 215 Ga. 518.

The mere use of one's property by a small portion of the public, even for an extended period of time, will not amount to a dedication of the property to a public use, unless it clearly appears that there was an intention to dedicate. Here, it is unequivocally clear that Senator Bacon

did not intend a dedication of the property in question. See *Healey v. City of Atlanta*, 125 Ga. 736, 738; *Nelson v. Girard, supra*; *Sams v. Seaboard Air Line Railway Company*, 218 Ga. 569 and *City of Cornelia v. Southern Railway Company*, 221 Ga. 444. If this court should find, however, that there has been a dedication of this property, we believe a reversion to the heirs of the grantor is inevitable.

[984] "Any use which is inconsistent, or which substantially and materially interferes, with the use of the property for the particular purpose to which it was dedicated, will constitute a misuser or diversion; and while *under the general rule* a misuser or diversion of the property will not work a reversion of the property free from the easement to the owner of the dominant fee, equity will, on the petition of proper parties, enjoin such misuser or diversion." *Brown v. City of East Point, supra*. (Emphasis added.)

In that case the use of property as a street which had originally been dedicated as a sidewalk was held to constitute a misuser. Under this rule we feel that admission of Negroes to the park would constitute a misuser of property originally dedicated to the use of white women and children. The City would therefore be faced with the mandate of the United States Supreme Court, subsequently adopted by the Georgia courts, to the effect that the park is a public accommodation and that the City cannot relieve itself by the appointment of private, successor trustees. Under these circumstances, we feel a reversion would be inevitable.

Secondly, we are of the opinion that Senator Bacon by his Will created a charitable trust, wherefrom the fee simple interest was conveyed to a public corporation for the use and benefit of unascertained, public beneficiaries.

Being of such opinion the Attorney General then occupies a position somewhat analogous to that of a trustee and as such owes obligations both to the trust and to the beneficiaries under such trust.

As previously stated, we feel as though Ga. Code Ann. § 108-212 which provides *inter alia* as follows:

"In all cases which the rights of beneficiaries under a charitable trust shall be [985] involved, the Attorney General . . . shall . . . represent the interests of the State of Georgia as *parens patriae* in all legal matters pertaining to the administration and disposition of such trusts."

places a responsibility on the Attorney General to rely on the doctrine of *cy pres*. Under the provisions of Ga. Code Ann. § 108-202 it is provided:

"When a valid charitable bequest is incapable for some reason of execution in the exact manner, provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention."

Additionally, Ga. Code Ann. § 113-815, reads as follows:

"A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator."

In order for the *cy pres* doctrine to be invoked, there must exist at least two conditions: (1) a general chari-

table intent establishing a charitable trust, and (2) a failure of the trust because the manner for carrying it out has become impossible (§ 108-202).

Senator Bacon's Will clearly expressed his charitable intent, to wit:

"I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified by my gratitude [986] to and love for the people of the City of Macon from whom through a long life time I have received so much personal kindness and so much of public honor. . . ."

A public park qualifies as the object of a charitable trust. See Ga. Code Ann. §§ 108-203, 69-504. The class restrictions contained in Senator Bacon's Will do not negate this charitable purpose, as discussed in 15 Am. Jur. 2d 12 (1964):

"It is well established that the public at large need have no clearly discernible interest in the enforcement of a gift in order to qualify it as charitable. A gift the specified benefits of which are confined to described classes of persons of a particular town or community . . . will qualify as charitable [citations omitted]. Size of the class which will benefit is a factor, but there is no measuring stick [citations omitted]. In a sense, it can properly be said that a gift, to qualify as charitable, must not be confined to privileged individuals and its direct benefits must be available to enough members of the community, without individually identifying them in advance, to give it at least a tinge of public interest or benefit [citations omitted]. . . ."

Senator Bacon provided that the park was to be used for all white women and children of the City of Macon, and

encompassed a large enough class, both economically and socially, of the citizens of the City of Macon to qualify as a charitable bequest for a public purpose.

The fact that it has become impossible to administer Baconsfield as Senator Bacon had intended is all too clear from recent court decisions. See *Pennsylvania v. Board of Trusts*, 353 U.S. 230, 1 L. ed. 2d 792, 77 S. Ct. 806; *Marsh v. Alabama*, 326 U.S. 230, 90, L. ed. 265, 66 S. Ct. 276; *Terry [987] v. Adams*, 345 U.S. 461, 97 L. ed. 1152, 73 S. Ct. 809; *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468; *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462, 96 L. ed. 1068, 1077, 72 S. Ct. 813; and *Watson v. Memphis*, 373 U.S. 526, 10 L. ed. 2d 529, 83 S. Ct. 1314.

The *cy pres* doctrine can and should be applicable to Baconsfield as it has become impossible to apply the property left by the donor in the exact way in which he directed its use.

Of course no general rule can be enumerated as to the manner in which the *cy pres* doctrine can or will be applied. Each case must necessarily depend upon its own peculiar circumstances. Under the facts of this case it appears that the City of Macon received a fee simple interest under Senator Bacon's Will rather than a determinable fee. While the purpose for which the City could use the land was limited, the Will did not specify that the City hold title only "so long as," "as long as," or "while" the racial limitations were in force, nor was there any similar term of time or duration which is normally found in a determinable fee. Also, and perhaps most important, the Will contained no statement of reverter in the event the property was not used as specifically outlined therein. As the intention of the testator controls, he *may* provide for the

revocation or termination of a charitable donation upon misuse, however, where no such provisions are made, and the charitable donation is a complete gift, the estate of the testator is completely divested of the title when the Will goes into effect. Therefore, we feel in the absence of any provision for reversion of the property in case Senator Bacon's directions are not or cannot be strictly complied with that such fact should constitute an invitation to a liberal construction of the Will by this court. The fact that the purpose of the gift cannot be carried out by reason of some legal or practical obstacle, is no basis for a claim of reverter.

[988] Experience has taught that the continual change in the course of human events quite often ultimately make impossible the manner of continuing the charitable bequest as prescribed by the testator. Here Senator Bacon has not provided how the property should be disposed of in the event his bequest could not be effectuated as prescribed, therefore we respectfully feel it is incumbent upon this court to invoke the *cy pres* doctrine and continue the charity in a manner next most consonant with the intention of the testator, *i.e.*, as a park for all the citizens of the State of Georgia.

We do additionally see no reason whatsoever why the City of Macon should not be allowed to resign as trustee of Baconsfield, particularly in view of its inability to carry out the provisions of Senator Bacon's trust. Also the Supreme Court of the United States in *Evans v. Newton*, 382 U.S. 296; 86 S. Ct. 486; 15 L. ed. 2d 373, in its majority opinion concerning reversal of *Evans v. Newton*, 220 Ga. 280, did not make any specific ruling as to right of the City of Macon to resign as trustee.

We respectfully call the Court's attention to an excellent discussion of *Evans v. Newton*, *supra*, in 2 G.S.B.J. 487-

494 (May, 1966), a copy of which is attached hereto as
"Exhibit A."

/s/ **ARTHUR K. BOLTON**
Arthur K. Bolton
Attorney General

/s/ **GEORGE J. HEARN, III**
George J. Hearn, III
Assistant Attorney General

/s/ **WILLIAM R. CHILDERS, JR.**
William R. Childers, Jr.
Attorney

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[999]

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

[TITLE OMITTED]

(ORDER AND DECREE—Filed May 14, 1968)

The above case was heard on Motion for Summary Judgment filed November 10, 1966, in behalf of Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee as Successor Trustees under Item 6th of the will of Augustus Octavius Bacon, deceased, who for convenience will be referred to as Senator Bacon. Said case was heard upon remand from the Supreme Court of Georgia for further proceedings in this Court consistent with its decision and with the decision of the Supreme Court of the United States of January 17, 1966, with specific direction to this Court to pass on contentions of the parties not passed on previously.

Said Motion and the rule nisi issued thereon were duly served upon all parties and responses thereto were filed. Various witnesses were examined by deposition and both supporting and opposition affidavits were filed. Additional parties were made and the Motion was duly assigned for hearing and was heard in open court. The parties through their respective counsel made oral arguments and within the time allowed for that purpose by the Court filed written briefs, all of which were carefully considered.

Having taken the case under consideration the Court on December 1, 1967, advised all attorneys of record by letter of its findings and conclusions. A copy of said letter of December 1, 1967, is filed with the Clerk as a part of the [1000] record in said case, and by reference is incorporated herein as findings and conclusions of the

Court. This decree is entered pursuant to and in accordance with the findings and conclusions therein and herein made.

IT IS NOW, THEREFORE, CONSIDERED, ORDERED AND DECREED BY THE COURT AS FOLLOWS:

(1) The Court has jurisdiction of the subject matter of the case and of the parties, and all necessary parties are properly before the Court. All parties have been given opportunity to be heard, and to present either supporting or opposition affidavits or responses, and all parties have been heard upon the issues involved.

(2) Rev. E. S. Evans and others as members of the Negro race were allowed to intervene in opposition to the complaint on behalf of themselves and other Negroes similarly situated as a class, and as intervenors to challenge the validity of certain of the provisions of the will of Senator Bacon and to seek relief against the petitioners. Upon appeal by them from the prior judgment of this Court the Supreme Court of the United States on January 17, 1966, ruled that Baconsfield Park could no longer be operated for the exclusive benefit of white persons as clearly provided by Senator Bacon's will, and that ruling is now the law of this case. Consistent with the further provisions of this decree no sufficient cause is shown for the grant of other or further relief to said intervenors, and the relief prayed for by them is denied.

(3) By virtue of and upon the aforesaid decision of the United States Supreme Court of January 17, 1966, the essential purpose of the trust established by Items 9th and 10th of Senator Bacon's will was voided and became impossible of performance and said trust thereupon failed and was terminated.

[1001] The Court finds and concludes, contrary to the contention of counsel for the intervenors, Reverend E. S.

Evans, et al., that the doctrine of cy pres is not applicable to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys, and white children of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield.

The Court has considered the argument of counsel for the intervenors, Reverend E. S. Evans, et al., concerning their contention that "Baconsfield Park has been dedicated to the public and a public easement has been created which cannot be defeated merely by the termination of the trust." It is clear that there has been no dedication of Baconsfield as a park for the use of the general public. The trust was created for a limited purpose, i.e., for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of Macon. It is therefore the Court's conclusion that the concept of dedication raised by counsel for the intervenors is without application in this case.

With reference to the contention of the intervenors in regard to the Bacon heirs being estopped, there is nothing in the record to support this contention.

[1002] It is my opinion that *Shelley vs. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), does not support the position of the intervenors. It is further my opinion that no federal question is presented in regard to the reversion of Baconsfield, but rather this property has reverted by operation of law in accordance with well settled principles of Georgia property law.

Under the laws of the State of Georgia on January 17, 1966, the title to and right to possession of the trust assets reverted automatically by operation of law to Senator Bacon, or to his heirs or estate, and it is declared and adjudged that such title to and right to possession has so reverted.

(4) Under the decision and mandate of the Supreme Court of Georgia reversing the prior judgment of this Court the trust property was left without a trustee. In view of the failure and termination of said trust and the reversion by operation of law of the trust assets, it is not necessary that there be a trustee.

(5) The prior order of this Court accepting the resignation of the City of Macon as Trustee and appointing Successor Trustees is vacated. Nevertheless, since the City of Macon has no trust assets in its hands to be accounted for, and has reaffirmed its resignation and has again announced its refusal to serve as Trustee, and requested its discharge from the case, no further order of this Court with respect to the resignation of the City of Macon is necessary. The City of Macon having no further trust duties to perform or trust assets to be accounted for is dismissed as a party to this case.

(6) The Successor Trustees who were appointed by this Court have acted under their appointment as de facto Trustees and their acts and doings in that capacity are ratified and approved insofar as they have acted in accordance with the direction and authority given to them [1003] by virtue of their appointment. Specifically this includes the appointment by them of the Board of Managers to perform the duties and functions imposed upon the Board of Managers established under Senator Bacon's will and the acts and doings of said Board of Managers are similarly ratified and approved insofar as they have

acted in accordance with the terms of Senator Bacon's will applicable to them and under the authority and directions given to them by this Court.

(7) The Successor Trustees appointed by this Court and the Board of Managers appointed by them with the approval of this Court shall within thirty days after the date of this order file in the office of the Clerk of this Court detailed reports of their acts and doings in their respective capacities, (1) listing and identifying the trust assets, properties and funds in their hands, and (2) showing and accounting for their receipts and disbursements. Objections to said reports and accountings may be made by any party desiring to object thereto within thirty days from the date of the filing of said reports and accountings, and upon the expiration of said periods of time said reports and accountings shall be submitted to the Court for its approval or disapproval. Copies of said reports and accountings shall be served upon all attorneys of record in this case who shall be notified of the date of filing and of the time within which objections thereto may be filed. Upon approval of such reports and accountings the Successor Trustees appointed by this Court and the Board of Managers appointed by them shall be thereupon discharged and dismissed as parties to this litigation.

(8) For the purpose of receiving the reports and accountings to be made by the Successor Trustees and by the Board of Managers, as above provided, and for the further purpose of preserving and administering the assets, property and funds until this decree becomes final, Guyton [1004] G. Abney and Willis B. Sparks, Jr. are named and appointed as Receivers. Copies of said reports and accountings shall be served upon them as upon other parties, and objections thereto may be filed by them as by other parties. Upon the filing of said reports and account-

ings all cash funds and other assets of the trust shall be paid over to the Receivers and receipted for by said Receivers, to be held and administered by them under the further direction of this court.

(9) Said Receivers are authorized and empowered to hold and manage the trust properties and assets under the further orders and directions of the Court until such time as they are directed by this Court to deliver and pay them over to the person or persons entitled thereto after this decree has become final. The Receivers are authorized to recognize and continue in effect any and all contracts or other commitments with respect to the trust properties heretofore entered into or made by the Successor Trustees, or their predecessor trustee, or by the Board of Managers at any time and however constituted, whether de jure or de facto, and to enter into other contracts and commitments normally incident to the management and preservation of the trust properties which are limited in duration to not exceeding one year, all without the necessity of seeking further direction by or approval of the Court. Subject to the right of any party to this case to file objections thereto which will be heard by the Court, the Receivers may apply for and obtain authority to enter into contracts and commitments extending longer than one year.

(10) The aforesaid Successor Trustees and members of the Board of Managers shall not receive any compensation for services heretofore or hereafter rendered by them but shall be allowed all reasonable and proper costs and expenses which [1005] they have incurred, including the cost and expense of employing agents or other employees in the performance of their duties, and including costs, expenses and obligations incurred by them in the conduct of this litigation, specifically including the compensation of attorneys employed by them, or by their predecessors,

in the conduct of this litigation or in connection with the management and operation of the properties and assets of said trust. Application shall be made to this Court for the approval of the compensation to be paid to their attorneys, and appropriate order will be made for such payment either out of the funds in the hands of the Receivers or as a charge upon the properties and assets in the hands of the persons to whom said assets are distributed.

(11) The costs of this proceeding to be taxed by the Clerk including all prior costs on appeal are assessed against the properties in the hands of the Receivers and shall be paid out of these assets.

(12) Said trust having failed and terminated and the title to said assets having reverted by operation of law it is determined and decreed by the Court that said title has by operation of law vested as follows:

(a) One-half interest in Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as Successor Trustees under Item 6th of the will of Senator Bacon for the benefit for life of Shirley Holcomb Curry, Marie Louise Lamar Curry and Manley Lamar Bacon Curry, surviving children of Augusta Lamar Bacon, deceased, and upon their deaths as provided therein.

(b) The remaining one-half thereof in equal shares in fee simple in Willis B. Sparks, Jr., Virginia Lamar Sparks, M. Garten Sparks and in The Citizens and Southern National Bank and Willis B. Sparks, Jr. as Executors of the Will of A. O. B. Sparks, deceased.

(13) This Court retains jurisdiction of this case for the purpose of acting upon the reports and accountings to be made by the Successor Trustees and successor Board of Managers, and giving direction with reference thereto, for the purpose of acting upon all applications of attorneys

and others for compensation payable to them, for the purpose of receiving and acting upon reports and applications to be made by the Receivers appointed by this Court as hereinabove provided, and fixing their compensation, for any other or further decree or order of this Court necessary or appropriate to the enforcement of this decree, and for any other purpose not inconsistent with the provisions of this decree.

This 14 day of May, 1968.

/s/ O. L. LONG
J.S.C.M.C., Emeritus.

FILED IN OFFICE
14 day of May 1968
LILLIAN LAVINE
Deputy Clerk

[1007]

State of Georgia

SUPERIOR COURTS OF THE
MACON JUDICIAL CIRCUIT

Macon, Georgia

December 1, 1967

Chamber of:

Bibb, Crawford

Hale Bell

Peach and Houston

C. Cloud Morgan

Counties

Geo. B. Culpepper, III

Judges

Mr. Willis Sparks, III

Jones, Sparks, Benton & Cork

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Macon, Georgia

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Macon, Georgia

[1008]

Honorable George J. Hearn, III
Assistant Attorney General
State Capitol
Atlanta, Georgia

Re: Charles E. Newton, et al
v. City of Macon

(Renewed Baconsfield Proceeding)

No. 25864, Bibb Superior Court

Gentlemen:

In passing upon the motion for summary judgment filed by the heirs of Senator Bacon I see no need to recite any of the pleadings, history or rulings of this Court, the Supreme Court of Georgia, or the Supreme Court of the United States, except as they may bear directly upon the issue raised by the motion.

The final order and decree of this court of March 10, 1964, was appealed to and affirmed by the Supreme Court of Georgia on September 28, 1964, and on writ of certiorari the United States Supreme Court reversed the judgment of the Supreme Court of Georgia on January 17, 1966. Thereafter on March 14, 1966, the judgment of the United States Supreme Court was made the judgment of the Supreme Court of Georgia, reversing and vacating the prior judgment of this Court. The Georgia Supreme Court remanded the case of this court for further proceedings consistent with the decision of the United States Supreme Court and specifically directed this court to pass on contentions of the parties not passed on previously.

In its decision of June 17, 1966 the United States Supreme Court ruled that Baconsfield could no longer be

operated for the exclusive benefit of white persons and ruled this was so whether the City of Macon remained as trustee or whether private trustees were appointed.

[1009] Movants contend that because of the January 17, 1966 decision of the United States Supreme Court Senator Bacon's trust became unenforceable and Baconsfield and the funds held for its support reverted at that time into Bacon's estate by operation of law. They contend further that the Supreme Court of Georgia on March 14, 1966 recognized this had occurred when the court expressed the opinion that the "sole purpose for which this trust was created has been terminated." Movants contend that this judgment of the Supreme Court of Georgia declaring what had transpired in regard to the title is now the law of the case and further that it remains only for this court at this time to give effect to said reversion of title.

Other relief sought in the motion for summary judgment is briefly stated as follows:

(1) The dismissal of the City of Macon as not now being a necessary party to this proceeding,

(2) An order allowing the Successor Trustees, Hugh M. Comer, Lawton Miller and B. L. Register to be relieved of any further duties except to account for the legal title to the trust properties, assets, etc.

(3) That the members of the Board of Managers be allowed to file an accounting of their acts and of the funds in their hands and then be released and acquitted from further liability,

(4) That one or more persons be appointed to take possession and custody of the properties, assets and funds of the charitable trust and to protect and manage the same under the further orders and directions of this Court and to transfer the title thereto and possession to the persons entitled to receive the same and

(5) That the relief prayed for by intervenors, Reverend E. S. Evans, et al, be denied.

[1010] Intervenors, Reverend E. S. Evans, et al, the only parties to object, appeared and filed objections to the motion for summary judgment and submitted evidence concerning the expenditure of tax monies of the City in the operation and maintenance of Baconsfield Park and in the building of a swimming pool located on the property. Evidence was also offered concerning the expenditure of funds by the Federal Government under the W.P.A. program in the furnishing of labor in the construction of Baconsfield clubhouse.

With reference to the evidence submitted by both the intervenors and movants there is little, if any, dispute as to the facts. The evidence is conclusive that Baconsfield park was at all times under the direct control and supervision of the Board of Managers and that funds realized from the handling of commercial properties were used in the improvement and operation of the park.

I have carefully considered the pleadings, the evidence and the brief of argument submitted by counsel for the intervenors, Reverend E. S. Evans, et al, and also the pleadings, the evidence and the brief of argument submitted by counsel for the Bacon heirs.

It is my considered opinion that when the Supreme Court of the United States rendered its decision in *Evans v. Newton*, 382 U. S. 296, 86 S. Ct. 486, 15 L.E. 2nd, 373 (1966) holding in a divided opinion that Baconsfield might not in the future be operated as a facility for the sole benefit of white persons, as specified in Senator Bacon's will, the trust failed, and the property reverted to Bacon's estate by operation of law.

It is my opinion, contrary to the contention of counsel for the intervenors, Reverend E. S. Evans, et al, that the

doctrine of *cy pres* is not applicable to Baconsfield. There is no general charitable purpose expressed in the will. It is [1011] clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys, and white children of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield.

I have considered the argument of counsel for the intervenors, Reverend E. S. Evans, et al, concerning their contention that "Baconsfield Park has been dedicated to the public and a public easement has been created which cannot be defeated merely by the termination of the trust". In my opinion it is clear that there has been no dedication of Baconsfield as a park for the use of the general public. The trust was created for a limited purpose, i.e., for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of Macon. It is therefore my opinion that the concept of dedication raised by counsel for the intervenors is without application in this case.

With reference to the contention of the intervenors in regard to the Bacon heirs being estopped, there is nothing in the record to support this contention.

It is my opinion that *Shelley vs Kramer* does not support the position of the intervenors. It is further my opinion that no federal question is presented in regard to the reversion of Baconsfield, but rather this property has reverted by operation of law in accordance with well settled principles of Georgia property law.

[1012] Counsel for the Bacon heirs will please prepare an order in accordance with the above for the Court's consideration, furnishing a copy of the same to counsel for the other parties.

Yours very truly,

O. L. Long

O. L. LONG, J.S.C.M.C. Emeritus

Filed in Office, 14 day of May, 1968

Lillian Lavine, Deputy Clerk

[7]

IN THE SUPERIOR COURT OF BIBB COUNTY, GEORGIA

Case No. 25864

CHARLES E. NEWTON, *et al.*

—vs—

CITY OF MACON, *et al.*

NOTICE OF APPEAL

Notice is hereby given that Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall and Rev. Van J. Malone, intervenors, hereby appeal to the Supreme Court of Georgia from the order entered in this case in the Bibb Superior Court on May 14, 1968.

The Clerk will please send the entire record on appeal including the transcript of evidence and proceedings which have previously been filed.

Dated: June 7, 1968

/s/ WILLIAM H. ALEXANDER
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*Attorneys for Rev. E. S. Evans,
et al., Intervenors*

[1106]

IN THE SUPREME COURT OF GEORGIA

Docket No. 24782

APPEAL FROM BIBB SUPERIOR COURT

[TITLE OMITTED]

ENUMERATION OF ERRORS

The appellants, Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall and Rev. Van J. Malone, enumerate the following errors made by the court below:

1. The trial court erred in ruling (in the order of May 14, 1968) that the Baconsfield property has reverted to the heirs and trustees under Senator Bacon's will by operation of the law.
2. The trial court erred in ruling (in the order of May 14, 1968) that the Baconsfield property and assets vested by operation of law to Guyton G. Abney, J. D. Crump, T. I. Denmark, Dr. W. G. Lee, Willis B. Sparks, Jr., Virginia Lamar Sparks, [1107] M. Garten Sparks and The Citizens and Southern National Bank and Willis B. Sparks, Jr., as executors of the Will of A. O. B. Sparks.
3. The trial court erred in ruling (in the order of May 14, 1968) that the essential purpose of the trust established by Items 9th and 10th of Senator Bacon's will was voided and became impossible of performance and that said trust therefore failed and was terminated.
4. The trial court erred in ruling (in the order of May 14, 1968) that there is no general charitable purpose expressed in Senator Bacon's will.

5. The trial court erred in ruling (in the order of May 14, 1968) that the doctrine of *cy pres* is not applicable of Baconsfield.
6. The trial court erred in ruling (in the order of May 14, 1968) that there has been no dedication of Baconsfield as a park for the use of the general public.
7. The trial court erred in not finding (in the order of May 14, 1968) that a public easement had been created in Baconsfield Park.
8. The trial court erred in ruling (in the order of May 14, 1968) that the Bacon heirs were not estopped from seeking to have Baconsfield revert to them.
9. The trial court erred in ruling (in the order of May 14, 1968) that it is not necessary to have a trustee to handle the Baconsfield property.
10. The trial court erred (in the order of May 14, 1968) in dismissing the City of Macon as a party to this case.
11. The trial court erred (in the order of May 14, 1968) in appointing Guyton G. Abney and Willis B. Sparks, Jr. as Receivers of the Baconsfield property.
12. The trial court erred (in the order of May 14, 1968) by not following the mandate of the United States Supreme Court [1108] that Baconsfield Park is a "public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law."
13. The trial court erred (in the order of May 14, 1968) and violated appellants' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment

to the Constitution of the United States by failing to rule that an application of the reverter doctrine or other doctrine finding a failure of the trust on the facts of this case would amount to a judicial sanction which imposed a penalty because governmental agencies managing Baconsfield Park fulfilled their Fourteenth Amendment obligation to operate the park on a racially nondiscriminatory basis.

14. The trial court erred in ruling (in the order of May 14, 1968) that the federal constitutional principles applied in *Shelley v. Kraemer*, 334 U.S. 1 (1948), which prohibit judicial action supporting racial discrimination did not support the position of the appellants.

15. The trial court erred and violated appellants' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States by ruling (in the order of May 14, 1968) that the Baconsfield Trust had failed where the state of Georgia, by enacting unconstitutional racially discriminatory park legislation, e.g., Georgia Code Ann., Sections 69-504 and 69-505 (Acts 1905, pp. 117-118), became involved in bringing about the discriminatory provision in the Baconsfield Trust.

16. The trial court erred and violated appellants' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States by applying (in the order of May 14, 1968) a variety of state law rules relating to the doctrine of *cy pres*, trust law, and the construction of Senator Bacon's will, the law pertaining to the [1109] dedication of park property and public easements and the law pertaining to equitable estoppel so as to defeat the rights of appellants

to racially nondiscriminatory use and access to Baconsfield as a public park.

17. The trial court erred and violated appellants' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States by ruling (in the order of May 14, 1968) that the trust failed and the property should revert to Senator Bacon's heirs notwithstanding that the trust assets include significant contributions of federal, state and local funds and that the governmental agencies have been significantly involved in the management and control of Baconsfield for a long period of years in order to avoid operation of Baconsfield as a racially integrated park.

18. The order and decree of the Bibb Superior Court dated May 14, 1968, containing the rulings enumerated above, erroneously denied and deprives appellants of rights, privileges, and immunities secured to them by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, by the Thirteenth Amendment to the Constitution of the United States and by Title 42, United States Code, Section 1982.

The Supreme Court rather than the Court of Appeals has jurisdiction of this case because (a) it involves the construction of the Constitution of the United States; (b) it draws into question the constitutionality of laws of the State of Georgia; (c) it involves title to land; (d) it is a case involving principles of equity; and (e) it involves the validity of, or the construction of a will.

Respectfully submitted,

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[1112]

SUPREME COURT OF GEORGIA

Decided December 5, 1968

[TITLE OMITTED]

The trial court did not err in entering a summary judgment holding that the trust created by the will of Senator A. O. Bacon had failed and that the trust property reverted to his heirs.

ARGUED SEPTEMBER 9, 1968—DECIDED DECEMBER 5, 1968.

Equitable petition; trust. Bibb Superior Court. Before Judge Long, Emeritus.

William H. Alexander, Jack Greenberg, James M. Nabrit, III, for appellants.

Jones, Cork, Miller & Benton, Charles M. Cork, Frank C. Jones, Timothy K. Adams, Trammell F. Shi, George C. Grant, Arthur K. Bolton, Attorney General, for appellees.

[1113] MOBLEY, Justice. This appeal is from an order of Bibb Superior Court which held that a trust created by Senator A. O. Bacon in his will dated March 28, 1911, providing for a park in the City of Macon, to be called Baconsfield, for the benefit of "white women, white girls, white boys and white children of the City of Macon," had failed and the property would revert by operation of law to the heirs at law of Senator Bacon.

The litigation was commenced in May, 1963, when Charles E. Newton and others, as members of the Board of Managers of Baconsfield, brought a petition against the City of Macon, as trustee under the will of Senator Bacon, and Guyton G. Abney and others, as successor trustees under the will, holding assets for the benefit of residuary beneficiaries, asserting that the City of Macon was failing

and refusing to enforce the provisions of the will with respect to the exclusive use of Baconsfield, and praying that the city be removed as a trustee. Reverend E. S. Evans and others, Negro residents of the City of Macon, on behalf of themselves and other Negroes [1114] similarly situated, filed an intervention, contending that the restriction in the trust limiting the use of the park to white women and children was illegal, and praying that the general charitable purpose of the testator be effectuated by refusing to appoint private persons as trustees. The heirs at law of Senator Bacon also intervened, praying that, if the relief sought by the original petitioners not be granted, the property revert to the heirs. The City of Macon in its answer alleged that it could not legally enforce segregation. The city later amended its answer, alleging that it had by resolution resigned as trustee under the will, and praying that its resignation be accepted by the court. The superior court accepted this resignation by the City of Macon and appointed new trustees. On appeal by the Negro intervenors from this judgment, this court affirmed the judgment of the trial court. For a full statement of the pleadings see *Evans v. Newton*, 220 Ga. 280 (138 SE2d 573).

The Supreme Court of the United States granted writ of certiorari and reversed the judgment of this court, holding in part: "Under the circumstances of this case, we cannot but [1115] conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. We may fairly assume that had the Georgia courts been of the view that even in private hands the park may not be operated for the public on a segregated basis, the resignation would not have been approved and private trustees appointed. We put the matter that way because on this re-

ord we cannot say that the transfer of title per se disentangled the park from segregation under the municipal regime that long controlled it." *Evans v. Newton*, 382 U.S. 296, 302 (86 SC 486, 15 LE2d 373).

The judgment of the Supreme Court of the United States was made the judgment of this Court. The opinion of this court remanding the case to the trial court was in part as follows: "When this case was before us for review, we sustained the orders of the trial judge accepting the resignation of the City of Macon as trustee of Baconsfield and appointing new trustees. The Supreme Court of the United States, in the general reversal [1116] of the judgment of this court, did not, in the majority opinion, make any specific ruling on the right of the City of Macon to resign as trustee or that new trustees could not be appointed. The resignation of the City of Macon as trustee of Baconsfield because of its inability to carry out the provisions of the trust being an accomplished fact (and we know of no law that could compel it to act as trustee) and the order of the court appointing new trustees having been reversed, the trust property is without a trustee. Even if new trustees were appointed, they would be compelled to operate and maintain the park as to Whites and Negroes on a non-discriminatory basis which would be contrary to and in violation of the specific purpose of the trust property as provided in the will of Senator Bacon. Under these circumstances, we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated. See Restatement (Second), Trusts § 335. 'Where a trust is expressly created . . . [and] fail[s] from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.' *Code* [1117] § 108-106(4))." *Evans v. Newton*, 221 Ga. 870 (148 SE2d 329).

On remand of the case to the Superior Court of Bibb County, a motion for summary judgment was filed by Guyton G. Abney and others, as successor trustees under the will of Senator Bacon. After consideration of depositions and affidavits, the Superior Court of Bibb County entered a summary judgment decreeing as follows: The relief prayed by Reverend E. S. Evans and other Negro intervenors is denied. Under the decision of the United States Supreme Court the essential purpose of the trust creating Baconsfield in Senator Bacon's will has become impossible of performance, and the trust has failed and is terminated. The doctrine of *cy pres* is not applicable to the trust creating Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, white women and children of Macon, and the language of the will clearly indicates that the limitation to this class of persons was an essential and indispensable part of the testator's plan for Baconsfield. There has been no dedication of Baconsfield as a park for the [1118] use of the general public. There is nothing in the record to support the contention that the Bacon heirs are estopped from claiming a reversion to them. The property has reverted by operation of law to these heirs. In view of the termination of the trust, it is not necessary that there be a trustee. The City of Macon having no further trust duties to perform or trust assets to account for, is dismissed as a party to the case. Certain acts and doings of the *de facto* successor trustees are ratified and approved. Receivers are appointed. The title to the assets of the trust property are decreed to be in the heirs at law of Senator Bacon.

The Negro intervenors appealed from this judgment, enumerating as error each of the findings of the trial court, and the failure to find that Baconsfield should be operated as a public park on a non-discriminatory basis. The inter-

venors contend that they have been denied due process of law and equal protection of the laws under the Constitution of the United States by the rulings made, and that the judgment does not follow the mandate of the Supreme Court of the United States.

[1119] 1. The intervenors urge that the doctrine of *cy pres* should be applied to Senator Bacon's will, and that the nearest effectuation of the intention of Senator Bacon would be to operate the park for the benefit of all citizens of the City of Macon. The doctrine of *cy pres* is expressed by *Code* § 108-202 as follows: "When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention."

Senator Bacon in the provision of his will creating Baconsfield was specific in listing the persons for whose benefit the trust was created, the beneficiaries being "the white women, white girls, white boys and white children of the City of Macon." He empowered the board of managers to exercise their discretion in also admitting "white men of the City of Macon, and white persons of other communities." He left no doubt as to his wish that the park be operated on a segregated basis. After expressing his kind feelings toward persons of the [1120] Negro race, he stated his reasons for limiting the beneficiaries of the trust to white persons as follows: "I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

The doctrine of *cy pres* can not be applied to establish a trust for an entirely different purpose from that intended by the testator. *Ford v. Thomas*, 111 Ga. 493 (36 SE 841).

In the opinion of this court remanding the case to Bibb Superior Court it was held that the sole purpose for which the trust was created had become impossible of accomplishment and the trust had terminated. This was, in effect, a determination that the doctrine of *cy pres* could not be applied to Senator Bacon's will so as to authorize the operation of the park for the benefit of the public generally. The intervenors sought no review of this ruling by the Supreme Court of the United States, and it has become the law of the case. The ruling now under review that the doctrine of *cy pres* can not be [1121] applied is consistent with the opinion of this court in *Evans v. Newton*, 221 Ga. 870, *supra*.

2. It is contended by the intervenors that Baconsfield was created under the provisions of *Code* § 69-504, authorizing any person to convey, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, lands for park or pleasure grounds, limited to the use of one race only, or women and children of one race only, and that this Code section violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. To hold that the trust provision of Senator Bacon's will was made pursuant to an unconstitutional Code section, would have the effect of making the trust impossible of performance (*Smith v. DuBose*, 78 Ga. 413, 434 (3 SE 309, 6 ASR 260)), and thus cause a reversion under *Code* § 108-106 (4).

3. It is contended by the intervenors that Senator Bacon's will should be construed to grant all reversionary interest in Baconsfield to the City of Macon. This assertion is based on language in the will vesting all title and interest, [1122] "including all remainders and reversions," to the City of Macon in trust for the persons specified.

Senator Bacon devised a life estate in the trust property to his wife and two daughters, and the language pointed out by the intervenors appears in the following provision of the will: "When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust etc." This language concerned remainders and reversions prior to the vesting of the legal title in the City of Macon, as trustee, and not to remainders and reversions occurring because of a failure of the trust, which Senator Bacon apparently did not contemplate, and for which he made no provision. The reversion to the heirs at law is not under [1123] the terms of his will but occurs because of the provision of our law that where an express trust fails from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs. *Code* § 108-106 (4).

4. It is asserted that the City of Macon acquired all of the interest in Baconsfield of the heirs and trustees of Senator Bacon by a deed dated February 4, 1920, and that the heirs and trustees are now estopped from asserting an interest in Baconsfield. This position is not tenable. The City of Macon does not assert that it has fee simple title to Baconsfield. Senator Bacon in Item 9 of his will designated certain property of his estate to form the park to be known as Baconsfield. This property was placed in trust in the hands of named trustees, first for the benefit of his wife and two daughters, and after their death, for

recreational uses of white women and children. The testator expressly denied the trustees any right to sell the trust property. The deed of the trustees dated February 4, 1920, was made in consideration of \$1,665 annually during the life of the remaining daughter of Senator Bacon and the [1124] expenditure of \$650 annually by the city for the improvement of the park, and its purpose was to allow the city to develop the property as a recreational area prior to the death of the remaining life tenant. It did not purport to convey any reversionary interest of heirs of Senator Bacon in the event the recreational park trust should terminate.

5. It is contended that, in obedience to the mandate of the United States Supreme Court, the City of Macon should be ordered re-instated as trustee of Baconsfield and directed to operate the park on a nonsegregated basis. The opinion of the Supreme Court of the United States held that the park could not be operated for the public on a segregated basis and generally reversed the judgment of this court affirming the judgment accepting the resignation of the City of Macon as trustee and appointing new trustees. The United States Supreme Court did not decide the question of whether the trust would terminate because of the inability of the trustees to effectuate the testator's purpose in creating the trust. With the termination of the trust, there is no question as to the right of the City [1125] of Macon to resign as trustee, since there can be no trustee without a trust to administer. Neither can there be an estoppel against the acceptance of the city's resignation as a trustee, where the trust has terminated, because of the expenditure of public money in the development of the park. Compare *Bennett v. Davis*, 201 Ga. 58 (39 SE2d 3).

6. The intervenors urge that they have been denied designated constitutional rights by the judgment of the Superior Court of Bibb County holding that the trust has failed and the property has reverted to Senator Bacon's estate by operation of law. We recognize the rule announced in *Shelley v. Kraemer*, 334 U.S. 1 (68 SC 836, 92 LE 1161, 3 ALR2d 441), that it is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution for a state court to enforce a private agreement to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. That case has no application to the facts of the present case.

Senator Bacon by his will selected a group of people, the white women and children of the City of Macon, to be the [1126] objects of his bounty in providing them with a recreational area. The intervenors were never objects of his bounty, and they never acquired any rights in the recreational area. They have not been deprived of their right to inherit, because they were given no inheritance.

The action of the trial court in declaring that the trust has failed, and that, under the laws of Georgia, the property has reverted to Senator Bacon's heirs, is not action by a state court enforcing racially discriminatory provisions. The original action by the Board of Managers of Baconsfield seeking to have the trust executed in accordance with the purpose of the testator has been defeated. It then was incumbent on the trial court to determine what disposition should be made of the property. The court correctly held that the property reverted to the heirs at law of Senator Bacon.

Judgment affirmed. All Justices concur.

[1127]

JUDGMENT

SUPREME COURT OF GEORGIA

ATLANTA, December 5, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

E. S. Evans et al. v. Guyton G. Abney, Trustee, et al.

This case came before this court upon an appeal from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[1130]

IN THE SUPREME COURT OF GEORGIA

[TITLE OMITTED]

ORDER GRANTING STAY

The foregoing motion having been read and considered, the Clerk of this Court is directed to withhold the remittitur of this case until further notice. It is further ordered that all additional proceedings in this case are stayed in this Court and the trial court below for a period of ninety (90) days with the understanding that if the appellants file an appeal or petition for a writ of certiorari with the United States Supreme Court during that period that this stay shall remain in effect until the United States Supreme Court makes a final disposition of the appeal or petition for writ of certiorari.

This 13 day of December, 1968.

/s/ W. H. DUCKWORTH
*Chief Justice, Supreme
Court of Georgia*

Supreme Court's Order—dated May 5, 1969

SUPREME COURT OF THE UNITED STATES

No. 1106, October Term, 1968

[TITLE OMITTED]

ORDER ALLOWING CERTIORARI

May 5, 1969.

The petition for a writ of certiorari is granted and the case is placed on the summary calendar.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

Supreme Court of the United States

No. 1106 ---, October Term, 19 68

E. S. Evans, et al.,

Petitioners,

v.

Guyton C. Abney, et al.

Order allowing certiorari. Filed May 5 19 69

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

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JOHN E. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1968

No.

60

REVEREND E. S. EVANS, *et al.*,

Petitioners,

v.

GUYTON G. ABNEY, *et al.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA**

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IN THE
Supreme Court of the United States

October Term, 1968

No.

REVEREND E. S. EVANS, *et al.*,

Petitioners,

v.

GUYTON G. ABNEY, *et al.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA**

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above-entitled case on December 5, 1968.¹

¹ Petitioners herein are Rev. E. S. Evans, Louis H. Wynn, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall and Rev. Van J. Malone. The respondents, i.e., appellees in the court below, are Guyton G. Abney, J. D. Crump, T. I. Denmark, Dr. W. G. Lee, Successor Trustees under the Will of A. O. Bacon; the City of Macon, Georgia; the Citizens and Southern National Bank and Willis B. Sparks, Jr., as Executors of the Will of A. O. B. Sparks; Willis B. Sparks, Jr. and M. Garten Sparks, Virginia Lamar Sparks and M. Barton Sparks, Heirs at Law of A. O. Bacon; Charles Newton, Mrs. T. J. Stewart, Frank M. Willingham, Mrs. Francis K. Hall, George P. Rankin, Jr., Mrs. Frederick W. Williams, Mrs. Kenneth Dunwoody, A. M. Anderson, Mrs. W. E. Pendleton, Jr., Mrs. R. A. McCord, Jr. and Mrs. Dan O'Callaghan, Members of the Board of Managers under the Will of A. O. Bacon; Hugh M. Comer, Lawton Miller and B. L. Register, Successor Trustees in lieu of the City of Macon.

Opinions Below

The letter opinion of the Judge of the Superior Court of Bibb County dated December 1, 1967, and filed May 14, 1968 (Appendix p. 1a, *infra*, R. 1007-1012) is unreported. The opinion of the Supreme Court of Georgia filed December 5, 1968, is reported at 165 S.E.2d 160 (Appendix p. 16a, *infra*; R. 1112-1126). Earlier proceedings in this same case are reported *sub nom. Evans v. Newton*, 220 Ga. 280, 138 S.E.2d 573 (1964), reversed 382 U.S. 296 (1966), on remand, 221 Ga. 870, 148 S.E.2d 329 (1966).

Jurisdiction

The judgment of the Supreme Court of the State of Georgia was entered on December 5, 1968 (R. 1127; Appendix p. 26a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), the petitioners having claimed the violation of their rights under the Constitution of the United States.

Questions Presented

1. Whether, in the absence of any reversionary clause in the will leaving property in trust as a park, the imposition by the Georgia court of a reversion to the heirs on a showing that Negroes have used, and must be allowed to use the park, constitutes an infringement by state power on a federal interest declared and created by the Constitution, both by its immediate penalization of compliance with the Fourteenth Amendment, and by its operation to discourage desegregation.
2. Whether the holdings by the state court that this trust has "failed" and that *cy pres* cannot apply, rest on a

ground impermissible under the Fourteenth Amendment—the ground that the presence of Negroes frustrates the enjoyment of the park by whites, even though the latter, the intended beneficiaries, may use the park as freely as ever.

3. Whether the racially exclusory language in Senator Bacon's will must as a matter of federal law be treated as null and void, both because the provisions were meant to form and did actually form a part of the public law material by which the City conducted its parks, and because federal law, in commanding equality between the races, commanded and by operation of law brought it about that this park, since it was "dedicated in perpetuity" to whites, must also be taken to be "dedicated in perpetuity" to Negroes.

Statutes Involved

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves the following Georgia statutes:

a. Georgia Code Section 69-504:

Ga. Code §69-504 (1933) (Acts, 1905, p. 117):

Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only,

or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

b. Georgia Code Section 69-505:

Ga. Code §69-505 (1933) (Acts, 1905, pp. 117, 118):

Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used (sic) and enjoyment thereof.

c. Georgia Code Section 108-202:

Cy pres.—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.

d. Georgia Code Section 113-815:

Charitable devise or bequest. Cy pres doctrine, application of.—A devise or bequest to a charitable use

will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

Statement of the Case

Petitioners are Negro citizens in Macon, Georgia who have sought in this extended litigation to desegregate Baconsfield Park, a previously all-white municipal park left to the City of Macon by the will of the late United States Senator Augustus Octavius Bacon. The case was reviewed by this Court once before in *Evans v. Newton*, 382 U.S. 296 (1966). The present petition seeks a review of a ruling by the Georgia courts that as a consequence of this Court's holding that the Fourteenth Amendment forbids the exclusion of Negro citizens from the park, Bacon's trust fails and the park and other trust property is forfeited by the City and reverts to the heirs of Senator Bacon.

The early course of the lawsuit, which was begun in the Superior Court of Bibb County, Georgia on May 4, 1963, is briefly summarized in the following excerpt from the opinion by Mr. Justice Douglas for the Court, *Evans v. Newton*, 382 U.S. 296, 297-298:

In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was

of the opinion that "in their social relations the two races (white and negro) should be forever separate." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.

Thereupon, individual members of the Board of Managers of the Park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Thereafter the city resigned as trustee and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and be-

queath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. 220 Ga. 280, 138 S. E. 2d 573.

This Court, in reversing the judgment of the Georgia Supreme Court, ruled that the park was "a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law" (382 U.S. at 302).

Immediately after this Court's decision, the Supreme Court of Georgia delivered a second opinion setting forth the view that the purpose for which the Baconsfield Trust was created had become impossible to accomplish and had terminated. *Evans v. Newton*, 221 Ga. 870, 148 S.E.2d 329 (1966). However, the judgment did not direct that the Superior Court on remand enter any particular order, but merely ruled that the court should pass on contentions of the parties not previously decided, and said that the "judgment of the Supreme Court of the United States is made the judgment of this Court" (148 S.E.2d at 331).

On remand in the Superior Court of Bibb County, a Motion for Summary Judgment (R. 136-141) (which was subsequently amended and supplemented by three additional pleadings (R. 622; 930; 939) was filed by Guyton G. Abney, et al. as Successor Trustees under the Last Will and Testament of Senator Augustus Octavius Bacon. The motion asked that the court rule that Senator Bacon's trust had become unenforceable, and that the Baconsfield property had reverted to movants as successor trustees under Item 6th of Bacon's will, and to certain named heirs of Senator Bacon (R. 141). The motion was opposed by petitioners, Rev. E. S. Evans, et al., the Negro citizens of Macon who

had earlier intervened seeking the racially nondiscriminatory operation of Baconsfield Park, by the filing of a response (R. 157-160) and four supplemental responses to the summary judgment motion (R. 371-374, 695-706, 917-918, 971). Petitioners filed numerous exhibits, as well as depositions, affidavits, answers to interrogatories and stipulations setting forth additional facts. Petitioners objected on federal constitutional grounds based on the due process and equal protection clauses of the Fourteenth Amendment, as well as on state law grounds, to the relief sought by the successor trustees and heirs. The heirs also filed several affidavits and exhibits supplementing the factual record. None of the other parties to the case, including the City of Macon, the Trustees of Baconsfield named by the court's order of March 10, 1964, or the members of the Board of Managers of Baconsfield (who initiated this lawsuit) either opposed the granting of the relief requested in the Motion for Summary Judgment, or offered any evidence. The court heard oral arguments on June 29, 1967, and granted the parties time to file further documentary evidence, which was filed.

At the hearing the petitioners, Evans, et al., suggested that the Attorney General of Georgia should be made a party to the case. By order dated July 21, 1967, the Attorney General was made a party pursuant to Georgia Code Section 108-212 (Acts 1952, pp. 121, 122; 1962, p. 527). The Attorney General of Georgia filed a "Response" opposing the relief requested by the heirs and supporting the position of the intervenors E. S. Evans, et al. that the doctrine of *cy pres* should be applied to save the trust (R. 975-988).

The Superior Court, granted the relief requested in the successor trustees' and heirs' Motion for Summary Judgment, ruling that the trust established by Senator Bacon failed immediately upon this Court's ruling in January

1966, that the City of Macon was dismissed from the case, and that the trust assets reverted to the successor trustees and heirs (R. 999-1006). In addition, the court ruled that the doctrine of *cy pres* was not applicable, that there was no dedication to the public, that the heirs were not estopped and that no federal constitutional rights of intervenors were violated by the reversion of the trust assets (*id.*). The Superior Court order and decree was entered May 14, 1968 (*id.*).

Petitioners duly appealed to the Supreme Court of Georgia, which filed an opinion December 5, 1968, affirming the decree of the Bibb Superior Court, and rejected petitioners' federal constitutional claims (R. 1112-1126). The court below stayed its remittitur and further proceedings pending the disposition of a timely petition for certiorari in this Court (R. 1130).

While the record filed with this case includes the entire record of proceedings before this Court on the prior petition, it also includes a good deal of additional factual data and evidence presented to the Superior Court on remand. The evidence develops the history of Baconsfield Park, and shows in great detail the substantial governmental investment, including the expenditure of both city and federal government funds, in establishing, improving and maintaining Baconsfield Park.

The Will

Senator A. O. Bacon provided in Item 9th of his Will (R. 16-34), signed in 1911 and probated in 1914, for the disposition of his farm called Baconsfield. He left the property in trust for the use of his wife and daughters during their lives (R. 22-23) and provided that after their deaths:

. . . it is my will that all right, title and interest in and to said property hereinbefore described and

bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for: the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. (R. 23)

The will provided for a seven member all-white Board of Managers to be chosen by the Mayor and Council of Macon (R. 23) and for the Board to have power to regulate the park, including discretion to admit men (R. 24). Senator Bacon directed that a portion of the property be used to gain income for the upkeep of the park (R. 24). He directed that "in no event and under no circumstances" should either the park property or the income-producing area be sold or otherwise alienated, and specified that except for the designated income-producing area the property "shall forever, and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified" (R. 24). The will stated Senator Bacon's belief that Negroes and whites should have separate recreation grounds (R. 25). It also stated his wish that the property be "preserved forever for the uses and purposes" indicated in the will, and that it be perpetually known as "Baconsfield" (R. 25). It provided that the trustees had no power to sell or dispose of the prop-

erty "under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others" (R. 26).

Item 10th of Senator Bacon's will bequeathed bonds, valued at \$10,000, to the City of Macon with directions that the income be used for the preservation, maintenance and improvement of Baconsfield (R. 26). The will said that if the City was without legal power under the city charter to hold the funds in trust, the City should select a successor trustee (R. 27). Bacon gave a similar direction for the City to select a successor trustee "if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said park and pleasure ground . . ." (R. 27-28).

In a 1913 codicil, Senator Bacon noted that one of his daughters, Mrs. Augusta Curry, had predeceased him, and provided that her children should stand in her place in the disposition of the property, except that with respect to Baconsfield their interest would cease upon the death of his wife and his other daughter (R. 32-33). Item 3rd of the codicil provided, *inter alia*:

To prevent possibility of misconstruction I hereby prescribe and declare that all interest of the said children of my said daughter Augusta in the property specified in Item 9 of my said Will and in the rents, issues and profits thereof, shall cease, end and determine upon the death of my wife Virginia Lamar Bacon and of my daughter Mary Louise Bacon Sparks (R. 33).

In Item 4th of the codicil, it was provided that Custis Nottingham, one of the trustees and executors under the will, and his family, could occupy a house on Baconsfield

rent-free until the full expiration of the trust for which he was appointed (R. 33).

The City of Macon Acquires Baconsfield—1920

The City of Macon obtained possession of Baconsfield in February 1920, many years before the death of Senator Bacon's surviving daughter, by virtue of an agreement between the City and the trustees under the will, which was entered into with the written assent of all of Senator Bacon's heirs. The agreement is set forth in the Macon City Council Minutes of February 3, 1920 (Intervenors' Exhibit O; R. 710-712). Under the agreement between the City and the trustees, which recites that it was executed with the signed assent of all legatees and beneficiaries of the Bacon estate, the trustees conveyed Baconsfield to the City by deed, and also conveyed to the City to be covered into the City treasury the bonds and accumulated interest bequeathed by Item 10th of the will (*Id.*). The deed of Baconsfield to the City appears in the record as Intervenors' Exhibit F; it was executed February 4, 1920, and recorded February 10, 1920 (R. 650-652). In the agreement the City agreed to pay the trustees the sum of \$1,665 annually during the life of Senator Bacon's daughter, Mrs. Sparks (R. 710-711). The City also agreed that it would appropriate 5% of the sum of the value of the bonds and accumulated interest each year, or \$650 annually, for the improvement of Baconsfield Park (*Id.*). The City agreed not to charge any taxes or other assessments of any kind against the property (*Id.*). At the same time the City agreed with Custis Nottingham that he would terminate his occupancy of a house in Baconsfield in consideration of a cash payment of \$5,100 from the City of Macon (Exhibit O R. 710). Nottingham's Quit Claim Deed to the City is Intervenors' Exhibit G (R. 653-654).

The City of Macon paid \$5,100 to Custis Nottingham in consideration of his deed of his interest in Baconsfield (R. 711). The City of Macon paid the trustees under the will an annuity each year during the life of Mrs. Mary Louise Bacon Sparks. The Baconsfield annuity payments of \$1,665 per year were regularly included in the Macon City budgets. (See, for example, budgets for the years 1939 and 1940, Intervenors' Exhibits T and U; R. 721, 722). Mrs. Sparks lived until May 31, 1944 (Intervenors' Exhibit W; R. 919). Accordingly, there were 25 payments of \$1,665 from February 1920 through February 1944, and the City of Macon thus paid a total of \$41,625 to the trustees under Bacon's will in order to acquire Baconsfield.

The Macon City Council Minutes of February 17, 1920 (Intervenors' Exhibit P; R. 713-714), reflect the fact that the City had taken over Baconsfield Park; that the council elected the first Board of Managers; that the Mayor of Macon, G. Glenn Toole, was elected to the Board of Managers; and that this election of the Mayor was requested by the trustees under Bacon's will, Messrs. Jordan and Nottingham, who wrote a letter to the Mayor stating:

In turning over to the City of Macon the park devised to it by Senator Bacon, permit us to express the hope that this Park will mean all to the white citizens of Macon that Senator Bacon wished it to mean.

The place is one of great natural beauty, but it could easily be marred by haphazard work. We are sure that before anything material is done to this property that you, the City Council, and the Commission appointed by it will have a well defined and permanent plan of improvement in view.

We believe that it is of the utmost importance that you be a member of this Commission, and wish here to voice the hope that you will not decline such service

from any false modesty. *It will greatly expedite the people's enjoyment of this property if the Commission is headed by the head of our City Government.* Differences in opinion and change of plans will be thus avoided, and the money essential to the improvement of this property will be expended by the one charged with raising it. (R. 713-714; emphasis added).

Mr. Toole, who was Mayor of Macon from 1918-1921 and from 1929-1933 (Heirs and Trustees Exhibit E; R. 931), remained a member of the Board of Managers until 1945. (Intervenors' Exhibit B, Baconsfield Minutes of May 30, 1945, and November 1, 1945; R. 557, 560, 563-564).

City Administration and Financial Aid to the Park and Federal Government Aid

Mr. T. Cleveland James was Superintendent of Parks of the City of Macon from 1915 to the time of his Deposition in April 1967 (R. 285-286). He developed most of Macon's parks, including Baconsfield and exercised general supervision over Baconsfield for many years. He testified that Baconsfield was a "wilderness" with "undergrowth everywhere" and no facilities at the time the Mayor directed him to take charge of the park (R. 278; 307). Supt. James initially developed Baconsfield Park using workmen who were paid by the federal Works Progress Administration, an agency of the United States. The W.P.A. men were working at Baconsfield under his supervision for a period he estimated as a year or more (R. 283, 307). The federally paid workmen cleared the underbrush, cleared foot paths, built footbridges, dug ponds, built benches, planted trees and flowers and generally performed landscaping work in Baconsfield Park (R. 278-284, 287). The W.P.A. workers did similar work in other city parks under the supervision of the City Park Superintendent (R. 298). Mr. James'

testimony is supplemented and corroborated by W.P.A. records from the archives of the United States (Intervenors' Exhibit E; R. 595-649) which reflect that Works Progress Administration Work Project No. 244 involved landscaping city parks in Macon, Georgia under the supervision of the City Park Superintendent. The W.P.A. records indicate that W.P.A. Project No. 244 was approved August 7, 1935; that the federal government paid \$120,032.35 for 469,079 man hours of work; and that the sponsor (City of Macon) paid \$17,923.43 for work on the project (R. 599). The W.P.A. records do not indicate how much of the labor was at Baconsfield and how much was at other city parks. But, Mr. James' testimony indicates that W.P.A. work at Baconsfield was very extensive (R. 307):

Q. Will you describe for us very briefly what you meant when you said Baconsfield Park was a wilderness when you first went out there?

A. Well, there wasn't nothing there but just undergrowth everywhere, one road through there and that's all, one paved road.

Q. And no facilities out there; is that correct?

A. No.

Q. And how long did it take you to turn it into a usable park?

A. Oh, about 6 or 8 months, probably a year.

Q. I see, and you used employees fairly regularly during all of that year?

A. Yes.

Q. Every day?

A. Well, we had the PWA labor, trying to get me to give them something to do, you know, and I worked them over there.

Q. You say you used the PWA employees for maybe a year?

A. I expect I did, yes, that is what I did my work with.

The minutes of the Baconsfield Board of Managers meeting held March 30, 1936 (Intervenors' Exhibit B; R. 507-509), indicate that considerable development, landscaping and planting had been done in the park during the preceding 12 months. No earlier minutes of the Board are available (R. 507). However, the Board minutes indicate an extensive pattern of governmental involvement in the maintenance of the park from 1936 until the City resigned as trustee of the park in 1964. (The minutes from 1936-1945 are Exhibit B, R. 506-565. The minutes from 1945-1967 are Exhibit A, R. 376-505). The City's involvement in the operation of the park was manifested in a great number of ways. For example, for a twelve year period from 1936 to 1948, all but one of twenty-one meetings of the Board of Managers of Baconsfield took place in the Mayor's office or elsewhere in Macon's City Hall. During the same period the Mayor of Macon attended 16 of the 21 meetings. (See, generally, Intervenors' Exhibits A and B *supra*). The minutes reflect that over an extended period of years the Board of Managers frequently requested and obtained assistance from the City of Macon in developing and improving the park. On occasion the minutes of the Board of Managers refer to Baconsfield variously as a "municipal park" (Intervenors' Exhibit A, Minutes of 5/6/53; R. 403) and to "Baconsfield and the other public parks of the City of Macon" (Intervenors' Exhibit A, resolution following minutes of 11/1/45; R. 564).

The deposition of Park Superintendent James and the Board of Managers' minutes indicate positively and conclusively that Baconsfield Park was maintained and operated as an integral part of the City park system from the time the park was first developed until the City resigned as trustee in 1964. Park department employees under Mr. James' supervision maintained Baconsfield just as they did all of the other city parks (R. 276, 289-290, 306). Mr. James

estimated that the City spent about \$5,000 for flowers and plants in Baconsfield during the years he worked there, and additional amounts were spent by the Board of Managers for gardening supplies (R. 295-296). In 1938, the United States government gave to the park 144 bamboo plants, representing six different varieties of bamboo (Intervenors' Exhibit B, Minutes of 6/28/38; R. 525). Mr. James regularly assigned men from the city Park Department to work in Baconsfield as the need arose (R. 276). City workers did all the general maintenance work in the park until 1964 (R. 278). For a period of years, Mr. James, the City Superintendent of Parks, lived in Baconsfield Park, occupying a home rent free. (Minutes of 10/16/47; Exhibit A; R. 391). The substantial value of the city's contribution of labor for upkeep of the park is demonstrated by the increase in the board's maintenance expenditures after the City resigned as trustee of the park in 1964 (R. 332-333). The amounts spent by the Board of Managers for maintenance in the years 1960-1966 were as follows:

1960 —	\$1,307.20
1961 —	\$1,645.72
1962 —	\$1,995.57
1963 —	\$1,465.20
1964 —	\$6,545.78
1965 —	\$7,073.80
1966 —	\$6,675.89

(Board of Managers' Answer to Interrogatory No. 9; R. 174.) The Chairman of the Board of Managers agreed that the cost increase in 1964 and thereafter was attributable to the fact that the City withdrew its services, and it became necessary for the board to pay for services which had previously been furnished by the City Parks Department (R. 332-333). The Mayor of Macon testified that he ordered all city employees to stop working at Baconsfield after the City resigned as trustee in 1964.

Baconsfield Clubhouse—Built by Federal Government

There is a two story brick building known as the Baconsfield Clubhouse located in the park. The clubhouse was built in 1939 by the Works Progress Administration (W.P.A.), an agency of the United States (Intervenors' Exhibits J (R. 708-709), K (R. 724-841), L (R. 842-846), M (R. 847-910), N (R. 911-913 and R (R. 718-719)). The clubhouse construction project was sponsored by the City of Macon acting in conjunction with a private group known as the Women's Clubhouse Commission. In its application for federal funds for this project, the City of Macon, by its Mayor and Treasurer, executed numerous documents constituting agreements, assurances, certificates, representations and contracts which are contained within the W.P.A. records (Intervenors' Exhibits K (R. 724-841) and M (R. 847-910)). The City in several documents represented to the United States that the City was the sole owner of the Baconsfield Park property (R. 774, 788-789), *that the City's ownership was "perpetual," that there were no reversionary or revocation clauses in the ownership documents* (R. 789), that the property was not private property (*id.*), and certified that the proposed clubhouse project was "for the use or benefit of the public" (R. 796, 808). Federal funds totaling \$16,512.80 were expended to construct the clubhouse (see Intervenors' Exhibits L (R. 842-846) and N (R. 911-913)). The city officials signed documents indicating that the sponsor's (City's) share of construction costs would be financed out of the "regular tax fund with the assistance of the Women's Club of Macon" (Intervenors' Exhibit K; R. 774). The Women's Club had agreed to contribute \$3,000 (Intervenors' Exhibit R; R. 718). The sponsor's (City's) share of the construction costs finally amounted to \$8,376.91 (R. 846, 913). The total costs of the clubhouse, including the federal contributions (\$16,512.80; R. 845, 912) was \$24,889.71 (Intervenors' Exhibits L and N).

In a sworn certificate executed under oath by the Mayor and Treasurer of the City of Macon on October 14, 1938, quoted in full below, the City promised that there would be no discrimination against any group or individual in the use of the clubhouse or the property upon which it was located, and *that the City did not intend to lease, sell, donate or otherwise convey title or release jurisdiction* of the property during the useful life of the improvements built with federal funds. The certificate contained in Intervenors' Exhibit K, reads as follows (R. 822) :

With reference to Works Progress Administration Project Application State Serial No. 6586, this is to certify that the proposed building referred to in plans, specifications and other data submitted to support the project applications, as "Baconsfield Club House" will, upon completion, be used as a community club house for the general use and benefit of the public at large, without discrimination against any individual, group of individuals, association, organization, club or other party or parties who may desire the use of the building and the property upon which the building is located.

It is further certified that the City of Macon, as project sponsor and owner of the property upon which the building is to be constructed, does not intend to lease, sell, donate or otherwise convey title or release jurisdiction of the property together with improvements made thereon, during the useful life of the improvements placed thereon through the aid of W. P. A. funds.

It is further certified that the City of Macon, as project sponsor, will be responsible to see that the property together with the improvements made thereon will be maintained for the general use and benefit of the pub-

lic, and will not be used for the profit or benefit of any one individual or specific group or organization; and the management of the property, together with improvements made thereon, will at all times be subject to the approval of the designated city official or officials of the City of Macon, who will be responsible to see that the foregoing certification is adhered to.

/s/ Charles L. Bowden
Mayor, City of Macon,
Georgia

/s/ Frank Branan
Treasurer, City of Macon,
Georgia

Another similar certificate or agreement containing assurances that the property "will not be leased, sold, donated or otherwise disposed of to any private individual or corporation, or to a quasi-public organization during the operation of the project" and would be "maintained by the Women's Club and operated for the benefit of the general public," was executed September 7, 1938, by the Mayor and Treasurer of the City of Macon and by the President and Treasurer of the Women's Club House Commission (Intervenors' Exhibit M at R. 889).

The Women's Club continues to occupy the clubhouse in Baconsfield Park, using the building free of charge and without paying rent either to the City or to the Board of Managers. The Women's Club charges fees for various organizations which use the building for meetings, but none of these funds go to the City or to the Board of Managers (R. 212-219, 312-315, 328-331). Mayor Merritt of Macon testified that he has attended meetings at the Clubhouse of such organizations as the Georgia Legal Secretaries Association, the Georgia Milk Dealers Association, and several

other local associations of various types (R. 216, 218). The minutes of the Board of Managers of Baconsfield indicate that the Board permitted the Highland Hill Baptist Church to use the Baconsfield Clubhouse as the temporary meeting place for the church during the construction of the church. The Board voted this permission for the church to use the Clubhouse at its meeting of June 25, 1953, notwithstanding its attorney's advice that this use was not permitted by Senator Bacon's will (Exhibit A, Minutes of 6/25/53; R. 404-407). A letter from the Chairman of the Board of Deacons of Highland Hill Baptist Church thanking the Board for the use of the Clubhouse as a meeting place for the church was read at the Baconsfield Board meeting of May 17, 1955 (Exhibit A, Minutes of 5/17/55; R. 424).

Public Roads in the Park

Certain roads running through Baconsfield Park were paved and developed by the City (R. 224-227; 279-280; see also, Intervenors' Exhibit A, Minutes of 5/17/55 (R. 425-426). On several occasions the Board of Managers resolved to seek federal funds for the paving of roadways in the park, but the record does not indicate whether any federal highway funds were actually obtained (see Intervenors' Exhibit B, Minutes of 3/30/36 (R. 508-509); 6/28/38 (R. 526); and 10/12/38 (R. 527)). On one occasion the City paid the Board of Managers the sum of \$1,000 as "partial reimbursement from City of Macon for paving in Baconsfield." (Intervenors' Exhibit A, financial statement following Minutes of 10/16/47; R. 393).

City-Built Swimming Pool and Bathhouses at Baconsfield

As early as 1936, the Board of Managers of Baconsfield began discussing the desirability of constructing a swimming pool in the park, and the discussion of government

aid for a pool continued for years (Intervenors' Exhibit B, Minutes of 6/29/36 (R. 512), 7/30/36 (R. 514), 12/7/36 (R. 517), 12/14/44 (R. 549), 5/30/45 (R. 551-557)). Finally, on June 3, 1947, the Chairman of the Board of Managers met with the Mayor and several aldermen of Macon and "strongly urged" that the City appropriate \$100,000 to build a pool in Baconsfield. (See Intervenors' Exhibit A, Minutes of 6/3/47; R. 382-383.) The City agreed to this suggestion and on July 22, 1947, resolved to deliver the sum of One Hundred Thousand Dollars to the Board of Managers of Baconsfield to be used by the Board for the construction of a swimming pool. (Intervenors' Exhibit I; R. 686; see also, Intervenors' Exhibit V; R. 723.) Subsequently, the City appropriated an additional Forty Thousand Dollars on December 23, 1947 to the Recreation Department to construct bathhouses at Baconsfield pool (Intervenors' Exhibit I; R. 686). The Baconsfield minutes indicate that the Board of Managers accepted the \$100,000 grant and designated the Chairman and Secretary of the Board of Managers and the Chairmen of the City Council's Finance and Recreation committees to act as agents to construct the pool and disburse the funds from a special swimming pool account. (Intervenors' Exhibit A, Minutes of 8/4/47; R. 386-388.) A large community swimming pool and adjacent buildings were constructed in 1948 on a portion of the Baconsfield land designated in Bacon's will as income-producing property. After the pool was constructed the Board of Managers and the City entered into a contract by which the pool was leased by the Board to the City for a two year term, to be automatically renewed for successive two year terms unless either party terminated the lease or the City breached its covenants (Heirs' Exhibit D; R. 678-683). The City agreed to operate the pool:

. . . as a part of the pleasure and recreational facilities of Baconsfield, for the enjoyment and benefit of

the beneficiaries of the trust for Baconsfield, as set up and established in the said last will and testament of the said A. O. Bacon, deceased, and also for other persons who are or may be admitted to Baconsfield (R. 680).

The City agreed to bear any losses in connection with the pool operation, and to share any profits with the Board. No payments to the Board were made under this provision (Heirs' Exhibit H and attached letter; R. 941-945). The City made additional capital expenditures at the pool and related facilities over the years for improvements, including the following amounts (Heirs' Exhibit H; R. 944):

1948	\$ 4,999.57
1960	6,079.21
1962	6,360.55
<hr/>	
\$17,439.33	

The sum of \$1,084.93, which remained in the old swimming pool account was transferred to the regular account of the Board of Managers in 1959. (Intervenors' Exhibit A, Minutes of 5/8/59; R. 451, and financial statement following Minutes of 10/29/59; R. 456.)

The pool was finally closed and the lease cancelled in 1964 in order to avoid racial desegregation as required by the Fourteenth Amendment. In April 1963, following attempts by Negro groups to integrate the park, the Board resolved to cancel its contract with the City relating to the pool and to attempt to negotiate a contract with a private party for operation of the pool (Minutes of 4/9/63; R. 483-484). At the same time, the Board directed its attorneys to commence this lawsuit to remove the City as trustee (Id.). The swimming pool contract was finally cancelled in May 1964. The Board's attorney wrote a letter

to Mayor Merritt dated May 22, 1964 (Intervenors' Exhibit X; R. 921-923) stating that it was cancelling the pool lease because of the City's inability to enforce racial segregation at the pool. The Mayor replied by letter dated May 28, 1964 (Intervenors' Exhibit Y; R. 924), acquiescing in the termination and relinquishing control of the pool to the Board of Managers. The swimming pool has remained closed since that time, and has not been maintained or kept in repair since 1964. Nearby highway construction which interfered with the pool area during a period of time has now been completed, but the pool remains closed.

City Operated Zoo

The City established a zoo in Baconsfield Park, with caged animals, including monkeys, a bear, ducks, rabbits, a raccoon, a few deer, and a few peafowl and pheasants. (Answer of Board to Interrogatory No. 2; R. 172-173.) Mayor Merritt stated that the zoo included 40 or 50 monkeys (R. 203). The zoo was closed and all the animals and cages removed after the City resigned as trustee in 1964. While the zoo was in operation the City employed a full-time employee at Baconsfield to take care of the animals (R. 205-206, 211, 290). The Public Works Department of Macon dismantled the zoo (R. 208).

Public School Playground

A playground in the Baconsfield Park is regularly used as the school playground for a nearby public school operated by the Bibb County Public School System. The school is Alexander School Number 3, a previously all white elementary school, which it was anticipated would be attended by a small number of Negro pupils living in the neighborhood under the school district's desegregation plan. (Intervenors' Exhibit W, Stipulation No. 2; R. 919.) The school personnel supervise the children in using the playground in Baconsfield (R. 235-236, 241-242). The Bibb

County Board of Education was responsible for having the playground installed, including basketball courts (R. 244, 262). Prior to 1964, the City Recreation Department had an employee assigned to the playground at Baconsfield to supervise the children. The City spent an average of \$1,180.70 per year to employ someone at the playground prior to February 1964 (R. 237-241).

City Leased Building

From 1954 until the present time, the City has leased a building referred to as the Open Air School from the Board of Managers and paid the Board a rental of \$300 per annum. (Exhibit A, Minutes of 6/24/54; R. 413; R. 246-251.) This is a one story brick building located in the portion of the Baconsfield property set aside for raising revenue (R. 246). The City in turn makes the building available, free of charge, to the Macon Young Women's Civic Club for the activities of the "Happy Hour Club," an organization of elderly people (R. 248-249). The building was previously occupied by the Board of Education rent free (Intervenors' Exhibit B, Minutes of 7/10/41; R. 541).

City-Aided Recreation Facilities

A Little League baseball field located in the park was constructed in part with the aid of the City which dumped 100 to 200 truck loads of dirt in a low area of Baconsfield where the field is now located (R. 219-222). The financial records of the Board indicated that it made a "part payment" to the City for filling in the play area in the amount of \$3,500. (Exhibit A, financial statement following Minutes of 12/18/56; R. 437.) The minutes do not indicate any subsequent payments.

Several tennis courts are maintained in the park. The City of Macon assisted in installing lights at the tennis courts to permit play at night. (R. 228-229; Minutes of 7/24/62; R. 475.) In 1964, the Board of Managers granted

to the Macon Tennis Club, a private club, permission for the club to regulate play at the Baconsfield Tennis Courts according to the rules of the club, and permission to maintain the tennis courts. (Intervenors' Exhibit A, Minutes of 4/10/64; R. 492.)

Sale of Portion of Trust Property to State

During World War II, when informed that the War Department wanted a strip of land to open a roadway, the Board and the City sold a strip of land from the area of Baconsfield devised by Senator Bacon as income-producing property to the State Highway Board of Georgia. (See the deed and attached resolutions, Intervenors' Exhibit H; R. 655-660.) The Board of Managers received a check in the amount of \$1,500 from the City of Macon in this transaction. (Intervenors' Exhibit B, Minutes of 3/3/42; R. 542-543, and financial statement following Minutes of 12/15/44; R. 550.)

Tax Exemption

The Board of Managers has never paid any taxes, federal, state, or local, on the Baconsfield property or on any of the income they have received. The property has always been treated as exempt from taxes under Georgia laws. (See Financial Statements in Intervenors' Exhibits A and B, *passim.*)

Income Property

The income-producing area of the trust property now includes a shopping center with several business, including a filling station, pharmacy, ice cream store, etc. The rental income of the Board of Managers during calendar year 1966 was \$7,058.37. (Computed from Intervenors' Exhibit C; R. 569-592.) The rental income received during the period April 1, 1963, to March 31, 1964, was \$5,225.04 (R. 346). During the years the Board also has received payment for various types of utility easements on the

property. In 1958, the Board received \$3,500 from the City Board of Water Commissioners for a sewer easement. (Intervenors' Exhibit A, financial statement following Minutes of 5/8/58; R. 446.) The State Highway Department acquired 26.932 acres of land in Baconsfield by condemnation proceedings in 1964 to construct a portion of Interstate Highway 16. (Heirs' Exhibit I; R. 923.) The Board of Managers was awarded the sum of \$131,000 in the condemnation, and the Court ordered that sum paid to the Chairman of the Board of Managers to be invested in short-term government bonds and to be held subject to the further order of the court pending the outcome of proceedings in the instant case (*ibid.*).

Assets of the Estate

The assets as of April 17, 1967, held by the First National Bank & Trust Company in Macon, as agent for the Board of Managers of Baconsfield, were stated by the Bank as follows (Intervenors' Exhibit D; R. 594):

"ASSETS:

Cash:

Principal Cash Overdraft	\$ 266.44
Income Cash Balance	9,443.67
	<hr/> \$ 9,177.23

Property:

Real Estate	255,000.00
U. S. Treasury Bonds	136,434.98
Savings Account First National Bank	7,795.05
	<hr/> 399,230.03

Total Assets

\$408,407.26

LESS:

Real Estate	255,000.00
Highway Right of Way Fund	143,766.92
	<hr/> 398,766.92
Rent Accumulation	<hr/> \$ 9,640.34"

The original trust fund of \$10,000 in bonds left by Senator Bacon, was long ago "depleted" according to the City (City's Answer to Interrogatory No. 13; R. 153).

An accounting filed by the successor trustees with the court below on June 3, 1968, showed the total trust assets to be \$404,810.77, including a book value for the real estate of \$255,000 (R. 1055).

How the Federal Questions Were Raised and Decided

The petitioners' federal constitutional objections to the order of the court below ruling that the Baconsfield Park property had reverted to the heirs were stated in their Response to the motion for summary judgment (R. 157-160) and in their several supplemental responses (R. 371-374, 695-706, 917-918, 971). The federal constitutional objections were repeatedly and elaborately articulated. The following excerpts from the Supplemental Response and the Second Supplemental Response represent the general thrust of petitioners' argument as stated to the Superior Court:

The entry of a judgment to the effect that the trust properties should revert to the heirs of Senator Bacon would violate the intervenors' rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, in that:

(a) A Judicial decree of reversion would not implement the intent of Senator Bacon's will, which expressed the legally incompatible intentions that (1) Negroes be excluded from Baconsfield Park, and (2) that Baconsfield Park be kept as a municipal park forever. A judicial choice between these incompatible

terms must be made in conformity with the said Fourteenth Amendment. The affirmative purpose of the trust, to have a park for white people, will not fail if the park is opened for all, and for the court to rule that the mere admission of Negroes to the park is such a detriment to white persons' use of the park as to frustrate the trust and cause it to fail, would be a violation of the said Fourteenth Amendment. (R. 371-372)

* * *

An application of the reverter doctrine or other doctrine finding a failure of the trust on the facts of this case would amount to a judicial sanction which imposed a penalty because the agencies managing Baconsfield Park fulfilled their Fourteenth Amendment obligation to operate the park on a racially non-discriminatory basis. The use of such a judicial sanction in these circumstances would violate the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (R. 702)

— 6 —

The due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States require that the racially exclusionary words of Senator A. O. Bacon's will relating to Baconsfield Park be treated by the courts as *pro non scripto* as though they were never written. This is required, firstly, because the racially exclusionary terms were written in the will to conform to racially exclusionary suggestions and requirements of Georgia Code Section 69-504 (Georgia Acts 1905, p. 117). The racial portions of Section 69-504 are void under the Fourteenth Amendment, and indeed were void *ab initio* even under the "separate but equal" doctrine, by authorizing the

total exclusion of Negroes from public parks, and thus must be regarded as *pro non scripto*. Secondly, it is required because by the City's acceptance of the park, pursuant to Georgia Code Section 69-505 (Georgia Acts 1905, pp. 117-118), and its operation of the park in accordance with Bacon's will, the will was made a part of the City's own laws governing the operation and use of the park, and is to be treated in the same manner as if the racially exclusionary words appeared in a city ordinance. (R. 702-703)

— 9 —

By virtue of all the facts and circumstances presented on the record of this case the City of Macon has so invested the Baconsfield Park with a public character, and the City has become involved to such an inextricable extent, that it would be a violation of the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment for the state courts to apply any state law doctrines (whether relating to trust law, the law of dedication, real property law, or other principles), so as to defeat the rights of the intervenors to racially non-discriminatory use and access to the park as a public park. (R. 704-705)

Before the Superior Court the constitutional claims were argued orally and were presented in full written briefs. The ruling of the trial court on petitioners' constitutional arguments was brief and general. The court stated in its order of May 14, 1967 (R. 1002):

It is my opinion that *Shelley vs. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.ed. 1161 (1948), does not support the position of the intervenors. It is further my opinion that no federal question is presented in regard to the reversion of Baconsfield, but rather this prop-

erty has reverted by operation of law in accordance with well settled principles of Georgia property law.

The federal questions were preserved on appeal by appropriate enumerations of error and again fully briefed before the Supreme Court of Georgia. The Supreme Court of Georgia also rejected petitioners' constitutional arguments on the merits. The court stated at the conclusion of its opinion (R. 1125-26) :

6. The intervenors urge that they have been denied designated constitutional rights by the judgment of the Superior Court of Bibb County holding that the trust has failed and the property has reverted to Senator Bacon's estate by operation of law. We recognize the rule announced in *Shelley v. Kraemer*, 334 U.S. 1 (68 SC 836, 92 LE1161, 3ALR2d 441), that it is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution for a state court to enforce a private agreement to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. That case has no application to the facts of the present case.

Senator Bacon by his will selected a group of people, the white women and children of the City of Macon, to be the objects of his bounty in providing them with a recreational area. The intervenors were never objects of his bounty, and they never acquired any rights in the recreational area. They have not been deprived of their right to inherit, because they were given no inheritance.

The action of the trial court in declaring that the trust has failed, and that, under the laws of Georgia, the property has reverted to Senator Bacon's heirs, is not action by a state court enforcing racially discrimi-

natory provisions. The original action by the Board of Managers of Baconsfield seeking to have the trust executed in accordance with the purpose of the testator has been defeated. It then was incumbent on the trial court to determine what disposition should be made of the property. The court correctly held that the property reverted to the heirs at law of Senator Bacon.

REASONS FOR GRANTING THE WRIT

I.

The Importance of the Question in the Framework of This Case.

A. *The Decision of the Georgia Court Frustrates This Court's Mandate in Evans v. Newton, 382 U.S. 296 (1966)*

It is evident that the decision to which this petition addresses itself makes a practical nullity of this Court's decision in *Evans v. Newton*, 382 U.S. 296 (1966). Whether it rightly does so is, of course, a matter for full argument. But it may be said *in limine* that this Court ought to scrutinize with plenary care a decision of a state court which utterly frustrates one of its own decisions in the same case.

But the repugnancy goes deeper than mere practical frustration. The proceedings of the Georgia court, it is submitted, have been directly disobedient to the clear implication of this Court's mandate.

When this Court uttered its prior decision in this case, the Georgia courts had taken one and only one action, with two aspects. They had accepted the City's resignation as trustee, and had appointed new trustees—all for the an-

nounced purpose of effecting racial discrimination. This Court "reversed" the Georgia decision. All there was to "reverse" was this substitution of trustees, and the "reversal" must therefore have amounted to a direction to reinstate the City as trustee. This has not been done.

To have obeyed this mandate would have brought it about that a public trustee, under a duty of defending the trust, would have continued a party to this action. The city of Macon, as trustee, would have been formally forced either to defend this trust against the heirs' claims or to account politically as trustee to *all* its citizens, white and colored, for its letting go by default the park they all will lose if it reverts. This position of the City might or might not have been decisive in shaping the fate of Baconsfield in the Georgia courts. But the hasty dismissal of the City as a party, in implicit disobedience to the mandate of this Court "reversing" a decree that dismissed the City as trustee, is at the least a peculiar circumstance in the case that ought to lead to full scrutiny.

B. The Decision of the Georgia Court Is Inconsonant With Prior Decisions of This Court

The Georgia court's decision cannot be squared with the doctrines of *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Reitman v. Mulkey*, 387 U.S. 369 (1967); and *Griffin v. County School Board*, 377 U.S. 218 (1964), amongst others, nor with the decision of the Third Circuit Court of Appeals in *Pennsylvania v. Brown*, 392 F.2d 120 (3rd Cir. 1968), cert. den. 391 U.S. 921 (1968), as will more fully be made to appear in II hereof.

C. Allowing the Georgia Court's Decision to Stand Will Seem to Open a Fertile Field for Implementing Racial Discrimination, and Will Therefore Encourage Schemes Aiming at Such Discrimination

The present case is a very strong one for scrutinizing the state court's action. First, the penalization by reverter is not in obedience to any private person's formed intent, but is rather by operation of present-day Georgia law (as is admitted by the Georgia court, see *infra*, p. 38). Secondly, the penalty operates not on a deliberately chosen breach of the terms of a deed or will, but on a breach compelled by the Fourteenth Amendment; the citizens of Macon are being deprived of their park because their city government is performing its federal duty. Thirdly, public rather than merely private interests are at stake.

If this Court lets stand without examination a case decreeing reversion on these extreme facts, the Georgia court's untouched ruling will be widely cited *a fortiori* to establish that the weapon of reverter is a legitimate one for enforcing racial discrimination in a vast range of circumstances. Racial discrimination will be reinvigorated and given new hope. This Court will in any case ultimately have to deal with the situation thereby created. The present case, for the reasons given, is an unusually favorable one for making a start.

II.

The Decree of the Court Below Is Hostile to the Petitioners' Right to Immunity From Racial Discrimination.

A. *The Decree of the Georgia Court Imposes the Drastic Penalty of Reverter on Compliance With the Fourteenth Amendment, and in so Doing Infringes Upon a Federal Interest Declared and Created by the Constitution, at the Same Time and by the Same Act Inflicting Detriment on the Petitioners and Encouraging Racial Discrimination*

The immediate contemporary facts presented by this record are simple and damning. A park was being operated by the city of Macon as trustee, and by a Board of Managers appointed by the City Council. The Fourteenth Amendment says that Negroes may not be excluded from a park so operated. Macon accordingly allowed Negroes to use the park. Upon this showing, the Georgia court decrees the extreme penalty of forfeiture of the property.

On the face of it, this constitutes a direct and drastic interference by the state of Georgia with a course of events charged with that high and positive federal interest which attaches to the commands of the Constitution. State power in no form and on no state-law doctrinal basis may take action hostile to a federal interest so expressed, and penalize that which the Constitution commands. *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948); and *Barrows v. Jackson*, 346 U.S. 249 (1953).

It is clear, in addition, that this action of the Georgia court will operate as a discouragement to expeditious and voluntary compliance with the Fourteenth Amendment, and will encourage racial discrimination, *contra* the decision

in *Reitman v. Mulkey*, 387 U.S. 369 (1967). If this Georgia decision stands, it will be taken as a strong precedent (*supra*, I, C) supporting the proposition that state courts may generally decree reversion of property for breach of a racial condition. The use of this device, and compliance by those placed *in terrorem*, will undoubtedly be significant.

Where, as here, the reverter occurs as to public property, Negroes will be discouraged from asserting their rights since they will know (and be told) that such assertion would be a futility since reversion would attend their success; this might be of little significance in Macon, but it might well be highly significant in small communities with few Negro inhabitants. Cities, reciprocally, would be encouraged to evade as long as possible their duty to integrate. A potential discouragement of racial equality need not be absolutely certain or highly substantial in order to offend the Constitution. See *Robinson v. Florida*, 378 U.S. 153 (1964), where the fact that a restaurateur, if he should desegregate, would be directed to put in separate toilets, was held sufficient discouragement to make unconstitutional his, in fact, discriminatory rule.

It is true that the detriment here imposed for failure to keep Baconsfield white is not one directly avoidable by keeping Baconsfield white, since that is forbidden by the Fourteenth Amendment. It might be argued, then, that the sanction of reverter does not in this case foster racial discrimination, since the racial discrimination involved cannot permissibly occur in any case. The consequence of this argument would seem to be an absurdity—that a state may impose any forfeiture it likes on the performance of a compelled federal duty, even though it cannot impose any forfeiture on the same act when that act is not a federal duty. If the argument had force, a state could fine a man,

in a moderate sum, for paying his federal income tax, since he has to pay that tax anyway, and hence cannot be influenced not to pay it by the fear of a small fine. Sound federalism is not built of such scholastic spiderwebs. The imposition by a state of a forfeiture, on a showing that a federally imposed duty has been or will be performed by a municipality, is as noxious an interference with national supremacy as can well be imagined. U. S. Constitution, Art. VI; see *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Crandall v. Nevada*, 73 U.S. 35 (1867).

A state which would thus impose a drastic forfeiture of property as a penalty for obedience to the Constitution, and, moreover, do so in a way that effectively discourages the assertion of federal rights and encourages their denial must surely come forward with some justification. The only justification even specious must be looked for in Senator Bacon's will. On examination, there are here two possibilities, one of which is totally and clearly demurral, and the other of which, being entirely unsustained by the record, is admitted by the Georgia court not to exist in fact.

First, Senator Bacon clearly and seriously desired that Negroes be excluded from this publicly operated park. But neither he nor any other person has any lawful power to command such a result. That result can be attained only by the repeal of the Fourteenth Amendment. Senator Bacon's desire in this regard is no more effective in law than would have been an expressed direction that a colored citizen of Macon chosen by lot stand in the stocks in the park every Sunday. There can never have been any doubt about this, since at least 1956, and no party connected with this case ever seems to have doubted it, but any possible doubt was laid at rest by the decision of this Court in *Evans v. Newton*, 382 U.S. 296 (1966).

A quite different expressed or implied desire of Senator Bacon might be brought forward as justification for what has been done; it might be said that Senator Bacon intended, desired, or willed the reversion of this property to his heirs if Negroes had to be allowed to use the park. If such intent were discernible, or inferable, an interesting question would be presented. The categorical fact is, however, that Senator Bacon's intent, desire, or will in this regard is unknown and unknowable, and in overwhelming probability never was so much as formed. The Georgia court admits this unmistakably, saying that the reversion which it decrees occurs "because of a failure of the trust, *which Senator Bacon apparently did not contemplate and for which he made no provision.*" (R.1122; Appendix, *infra* p. 22a) (emphasis added).

Despite this admission, which entirely covers the ground, it will be useful briefly to show how thoroughly unknowable Senator Bacon's intent in this regard must remain. First, the Bacon will, and this whole record, are absolutely silent on this point. One must therefore recur to the probabilities. The question then is, would a Georgian who died over fifty years ago prefer to have his lovely farm remain as a park with some Negroes using it along with whites, or would he prefer to have it become mere city real estate, fully alienable, subject to all the vicissitudes affecting such property through the decades and centuries? On the latter alternative, Negroes certainly cannot be excluded. If a restaurant is opened on the property, Negroes must be served. If rent property is erected, Negro tenants cannot be rejected. If there are sidewalks, Negroes cannot be kept off them. Senator Bacon's announced ground for his exclusionary policy—the prevention of "social relations" among the races—cannot be attained, even as to this property, by a reversion, except for so long as it remains completely "private" and in the hands, by chance, of a special sort of

"private" owners. What wise lawyer in 1911 would have thought that alienable city real estate, descending from heir to heir, could be kept completely "private," and in the hands of those who would prevent racial interrelation?

Senator Bacon, moreover, formed and expressed his desire for racial exclusion against a background of seemingly permanent racial separation. His desire for his park was congruent with the social system in which he lived. If he had known that separation of the races in public facilities of all sorts was to become impossible in Georgia, would he have preferred to let his farm become city real estate rather than let it be a park conducted on the same lines as all other public facilities in the State? Of course, no one can know.

Senator Bacon's wish to have Negroes excluded was firmly expressed, but by no means more firmly than was his desire to have this park stay a park forever. No man can attribute to Senator Bacon any choice, even as a matter of probable hypothetical prediction, between these goals. No party in this case, as it now stands, has any claim to be considered as the agent of Senator Bacon's wishes. The admission of the Georgia court to this effect is compelled by the record.

The state of Georgia, having acted through its courts to decree forfeiture of public property on a showing that Negroes have used it and must be allowed to use it, cannot (and does not), therefore, proffer the justification that it is merely carrying out the command of a private testator. (It is highly questionable whether even that justification would suffice, but petitioners need not here argue the point.) The only possible justification remaining is that the reversion occurs "by operation of law." But law "operates" as a human act; in this case the act is that of the Georgia court. Cf. *Erie R.R. v. Tompkins*, 304 U.S. 69 (1938).

Georgia may have any rules of trust law she desires, declaring these by statute or by judicial decision. Or she may, if she wishes, have no law of trusts at all. The one reservation is that no state law, particular or general, legislative in origin or judicially fashioned, concerning "failure of trust" or concerning anything else, may penalize obedience to federal law. The ruling below does just that.

These petitioners have standing to assert the ground developed in this section. The constitutional norm against racial discrimination, obedience to which is being penalized here, runs primarily in their favor. Cf. *Barrows v. Jackson*, 346 U.S. 249 (1953). These petitioners have, in addition, a direct and substantial interest in the treatment of the claim they here assert; if it is upheld, then the decree pronouncing reversion of this property is reversed, the park continues as a park, and these petitioners are (by force of the Fourteenth Amendment) entitled to use that park. *Evans v. Newton*, 382 U.S. 296 (1966). They have standing, then, in both senses of the term—they are the centrally intended beneficiaries of the rule they invoke, and they will in fact benefit substantially from its application in this case.

Although petitioners have standing, it is worthwhile noting how very widespread would be the impact of the penalty here imposed on the City's performance of its Fourteenth Amendment duty. In taking away this park, Georgia destroys values built up by many persons and entities. The City has spent money on the park—money contributed over the years by its citizens. The tax immunity enjoyed by this park has been in effect a huge subsidy at the expense of taxpayers of all races. The federal government has contributed to the creation and to the improvement of the park, in part after an *express* certification that it was a nondiscriminating public facility.

The decree of the Georgia court destroys all these values, repudiates this certification, and wipes out the deep and total public character which decades of maintenance and subsidy have given to Baconsfield—without any warrant for this step in Bacon's directions, and solely on the showing that the Negro members of the public may now use this public place.

B. *The Judgment That This Trust Has “Failed,” Though Its Intended Beneficiaries May Still Enjoy Its Benefits Just as Before, Can Rest Logically Only on the Proposition That, as a Matter of Law, the Presence of Negroes Spoils a Park for Whites, an Impermissible Ground Under the Fourteenth Amendment. The Rejection of the Cy Pres Alternative Must Rest on Similar Grounds*

The judgment of the Georgia court in this case must stand logically on a ground which the Fourteenth Amendment forbids any agency of the state government to occupy. The holding, on analysis, must rest on the proposition that, as a matter of law, the presence or proximity of Negroes, in any number, frustrates enjoyment, by whites, of a public amenity. This premise, as to the Negro race, is worse than "an assertion of their inferiority," *Strauder v. West Virginia*, 100 U.S. 303 (1880). It is an assertion of their obnoxiousness. The Fourteenth Amendment strikes down a state decision resting, by irresistible implication, on such a shocking ground. See the opinion of Mr. Justice Stewart, concurring, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961).²

The affirmative "purpose of the trust" established by Senator Bacon is not left obscure by him. It is the fur-

² Just as, in that case, there was no suggestion in the record that appellant was "offensive" to other customers, so there is no suggestion in this record that petitioners' presence "offends" whites to the extent of "frustrating" the purpose of a trust established for the benefit of the latter. Here, as there, the offensiveness of the Negroes is supplied, in effect, as a matter of law.

nishing of a public park to the whites of Macon. That purpose has not to any degree been "frustrated," in the normal sense of that word. The whites of Macon may still resort to Baconsfield just as freely as ever. There is not one scintilla of evidence in this record showing that the admission of Negroes as well either has diminished or faintly threatened to diminish the enjoyment of Baconsfield by whites. (If such evidence were ever to be offered in a proceeding of this sort, this Court would then have to consider whether such an issue of fact could ever be made in an American court.) The conclusion that this trust, clearly set up for the benefit of the whites of Macon, no longer benefits them, thus "frustrating" the affirmative purpose of the trust, must therefore rest on a conclusion, in effect one of law, that Negroes spoil a park for whites.

The only faint (and, it is submitted, illusory) hope of escape from this conclusion lies in the assertion that the exclusion of Negroes was itself a "purpose of the trust"—that is, one of the chief objects of its establishment. But to assert this is to assert a great absurdity, an absurdity too great to hide behind any generalities about "deference" to state courts; who would leave land in trust *for the purpose of excluding Negroes?* It is also to impute a truly sinister design to Senator Bacon, a design altogether inconsistent with his expressions of friendship for the Negro race. To call the exclusion of Negroes by Senator Bacon part of "the purpose of the trust" is to confuse the affirmative object he had in mind with a provision, incidental though important in his eyes, as to a collateral matter.

Confusion, but easily dispellable confusion, may be created by the fact that Bacon's will uses the word "sole . . ." But the adjective "sole" does not denote a mode or degree of enjoyment. Unpacked, it says no more than that Negroes are to be excluded. It does not in any way

differ in its reference from an explicit and separate provision for their exclusion, and does not make it any the less "the purpose of the trust" that the whites of Macon shall enjoy Baconsfield.

The Georgia court, in its opinion, repeatedly recognizes that the purpose of this trust was the furnishing of a park for Macon whites, e.g., "It is clear that the testator sought to benefit a certain group of people, white women and children of Macon . . ."; "the beneficiaries being 'the white women, white girls, white boys and white children' of the City of Macon . . ."; "Senator Bacon selected a group of people, the white women and children of the City of Macon, to be the objects of his bounty, in providing them with a recreational area."

Elsewhere, the Georgia court several times speaks of the total failure of this purpose, e.g., ". . . we are of the opinion that the *sole purpose* for which the trust was created has become impossible of accomplishment . . ."; ". . . the *sole purpose* . . . had become impossible of accomplishment . . ." (emphasis supplied).

It is interesting that these passages recognize and emphasize the unitary and simple character of this trust's object; it had a "*sole purpose*." But the passages previously quoted tell us, correctly, that this "*sole purpose*" was the furnishing of a park to the whites. There is no way whatever, therefore, to justify the judgment of the Georgia court, except on the basis that, as a matter of law, the proximity of Negroes destroys the value of the park for whites. That is the certain "hidden major premise" of the Georgia court's holding. (It is, of course, not petitioners' assertion that this proposition was consciously present to the Georgia court's mind.)

It is to be observed that this is emphatically not a case in which the court was asked to give effect to a provision

for reverter, in the event of Negroes' occupying or otherwise using property. That case can be decided when it is reached. Not even informally, not even by implication, did Senator Bacon provide for this reversion. (For full discussion of this point, and the Georgia court's admission thereon, see above, p. 38 et seq.)

It is then not Senator Bacon's will, in either sense of the word, that is being enforced. It is 1968 Georgia decisional law, and nothing else, that declares that a reversion is to be decreed when Negroes must be admitted to a place where a testator, in a will fifty-seven years old, has said they are not to go—though that testator did not himself provide for a reversion.

To sum up at this point, Georgia law provides for a resulting trust, in cases of this sort, only where the trust has "failed." Georgia Code, §108-106(4). This trust can be said to have "failed" only on one of two hypotheses:

(1) It was its "purpose"—its *affirmative* purpose in the sense that "failure" to attain that purpose is "failure" of the whole trust—to exclude Negroes. This is at once a sinister and an absurd interpretation, one to be rejected as soon as clearly stated. The Georgia court never espouses it; there is no indication Senator Bacon espoused it. For a state court to decree the forfeiture of property on such a premise would be to implement and support in the most drastic way a particularly noisome form of racism—and in this case to do so without even a support in the record for the settlor's having held such a view.

(2) It was the "purpose" of the trust, affirmatively, to furnish a park for white people, but that purpose "fails," even though white people may still use the park, because Negroes may also use it. Whatever words one uses to describe the evaluation of Negro presence on which this

alternative must rest—nuisances, obnoxious, detriments to enjoyment—the inescapable assumed premise is that, as a matter of law, the presence of Negroes causes white enjoyment to "fail." This is an impermissible ground under the Fourteenth Amendment.

If the Georgia court had had no alternative, under its state law, to decreeing reverter whenever *all* the particular terms of any trust could not be fulfilled, then a question of some complexity would be presented. We are spared the effort of analyzing this complex question, for Georgia law very plainly provided the court below with means of escape from a holding that a park must revert, and the underlying trust be treated as "failed," merely because some Negroes may now join the whites who continue to be beneficiaries in fact as well as in law.

The Georgia law of *cy pres* is codified in two sections of the Georgia Code:

108-202. *Cy pres*.—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.

113-815. *Charitable devise or bequest. Cy pres doctrine, application of.*—A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

On their face, these statutes seem to command application of *cy pres* to just such a situation as the one which confronted the Georgia court in this case. As far as §108-202 is concerned, it is entirely plain that continuance of the trust on a nondiscriminatory basis effectuates Senator Bacon's intention "as nearly as possible." There would be a large variance from his intention, but that variation, however large, would be as small "as possible" under the Fourteenth Amendment. Under §113-815, the application of *cy pres* to this case would have carried out the general directive of the first clause, and operation of the park on a nondiscriminatory bases would, again, amount to its operation in the "manner most similar" possible to that Bacon directed.

The Georgia court, in the opinion below, treats quite briefly the contention that *cy pres* should have been applied—not citing either of these statutes. Only one case, *Ford v. Thomas*, 111 Ga. 493, is cited—for the proposition that the doctrine "cannot be applied to establish a trust for an entirely different purpose from that intended by the testator"; on examination, all that case held was that insufficient effort had been exerted to fulfill the purpose the testator stated.

It is stressed in the opinion that Senator Bacon desired the exclusion of Negroes—a point conceded by all, and one only opening the question whether *cy pres* should have been applied.

Respondents, in their brief in the Georgia court, say that the "one Georgia case we find to be of significance is *Adams v. Bass*, 18 Ga. 130." That case, decided before the Civil War, voided a trust for the resettlement of Negro slaves in free states, on the ground that the particular states named by the testator would not admit them. Of this case, perhaps the best thing one can say is that it was

decided before the adoption either of the present Georgia code or of the Thirteenth and Fourteenth Amendments.

After *Adams v. Bass*, no Georgia case has been found in which a trust was allowed to fail, when beneficiaries and trustee were still in being, and when the intended benefit could still be received, merely because the trust could not be carried out in the manner directed by the settlor. The very least one can say, therefore, is that the Georgia court was not bound by any of its precedents, by any of its statutes, or (as it concedes) by anything dispositive or even suggestive in Senator Bacon's will, to choose not to save this trust. The state court was entirely free, and indeed was forced, to make its own choice, as an agency wielding state power, between that action (the application of *cy pres*) which would have saved the trust, and that action (the one it took) which would destroy the trust.

We have to construct the rationale necessary to explain logically the court's ruling, for the grounds it gives are little more than conclusory. But these grounds can be constructed with certainty—not in the sense that they were consciously present to the mind of the Georgia court, which petitioners do not assert, but that they are logically necessary to the holding.

It is submitted that, in deciding not to apply *cy pres* to this trust, the Georgia court necessarily decided that the racial limitation in Senator Bacon's will was of more dignity and importance than his equally or more solemn and explicit provisions for the perpetuity of this trust. This policy decision, by the court, was inescapable. For the only other person who could have decided it was Senator Bacon, and he did not decide it. The Georgia court concedes that he did not decide it (see p. 38, *supra*). The record would not support a finding that he decided it, but would, on the contrary, conclusively show that he did not decide it.

It does not avail to stress (as the Georgia court, in its brief treatment of the *cy pres* contention, stresses) that Senator Bacon very seriously desired to keep Negroes out of Baconsfield. The Georgia statutes, on their face, clearly provide for *cy pres* in the very case, and only in the very case, where the settlor's intent *cannot* be given effect. The question posed to the Georgia court, then, was not whether *cy pres* would fulfill Senator Bacon's whole intent, but whether the variation from that intent was *undesirable enough* to inhibit the use of the clearly available device of *cy pres*. The judgment of the Georgia court, under whatever view of state law taken, is therefore a judgment that forfeiture of this park and total failure of Senator Bacon's scheme is to be preferred to the admission of Negroes.

Georgia's *cy pres* statutes merely open the way to an unavoidable choice between these alternatives; neither they nor anything else in Georgia law compel the choice made. As to ordinary state law questions of this form, it goes without saying the Georgia court's choice would be final. But in this case the choice was made in a direction which clearly implies espousal by the state court of an estimate that racial mixture is crucially undesirable. Such a decision is wrong as a federal-law matter.

This state court, then, had to decide whether this trust was to be taken to have "failed"; its "failure," if any, consisted in nothing more or less than the admission of Negroes to enjoy the park along with the intended beneficiaries, who still could themselves enjoy it. Its own *cy pres* doctrines opened an easy conceptual and procedural path, under state law, for avoiding the federally impermissible result of "failure" on such facts. But the Georgia court chose to reject that alternative, thereby inevitably espousing the proposition that enjoyment of a park by

whites *in the absence* of Negroes so fundamentally differs from enjoyment of a park by whites *in the presence* of Negroes as to go not to the question of "exact manner" (§108-202) or "particular mode" (§113-815), but rather to the essence. Since the essence of enjoyment is enjoyment, this must in turn imply that the presence of Negroes, as a matter of law, critically impairs white enjoyment. The ground for declaring "failure" of the trust, and the ground for rejecting *cy pres*, came down then (as one would expect) to much the same ground—a ground profoundly insulting to Negroes, and hence impermissible under the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

C. At Least Under the Highly Special Circumstances of This Case, the Provision for Racial Discrimination in Baconsfield Ought, as a Matter of Federal Law, Under the Fourteenth Amendment, to Be Treated as Absolutely Void. If This Is Correct, Then Federal Law Commands That This Trust Be Continued and That the City Continue as Trustee, for It Is Clear That Without the Racially Discriminatory Language Georgia Law Compels That Result. Similarly, Federal Law Commands That a Public Park "Dedicated" to the White Public Be "Dedicated" to the Negro Public as Well

Senator Bacon's will was drawn under the then recently-enacted authority of the present Georgia Code §69-504:

Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other

property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.)

It looked backward, then, to recently enacted state legislation for its indispensable authorization. Even more important, on its face it clearly looked forward to further and quite centrally important official connection with state power, for it provided that the City of Macon should be trustee. When the City of Macon accepted this position, the racially discriminatory provisions in the will became tantamount to city ordinances—part of the normative material promulgated and espoused by the City with respect to the conduct of its parks. Senator Bacon, an eminent lawyer, knew and clearly wished that this part of his will would speedily gain this official status as part of the City's rules with respect to the operation of its park. It would seem quite artificial to treat such provisions at any stage in their rapid and intended progress from explicit statutory sanction toward the status of being, in effect, ordinances, in a manner different from that in which one would treat ordinances themselves. Indeed, their character as "mere" expressions of Bacon's will was merged in their character as city ordinances on the day the City of Macon accepted the trust.

But is it not clear that a city ordinance, commanding exclusion of a race from a large park, would simply be

stricken? Could a Georgia court be permitted thereafter to close the park and give the property back to the former owners, on the ground that the known or declared "purpose" of the laws about parks was the provision of parks on a discriminatory basis? See *Griffin v. County School Board*, 377 U.S. 218 (1964). Would not any public-law material declaring such a "purpose" have to be similarly stricken?

It is submitted, therefore, first, that Senator Bacon's directions about the discriminatory conduct of Baconsfield were intended by him to achieve very quickly the status of city ordinances, and they did in fact achieve and hold that status. Secondly, it is submitted that their status in this regard makes it suitable to treat them as unconstitutional city ordinances are always treated—i.e., nullities. If they are nullities, then there is not and never was any colorable ground for termination of the trust or for the City's resignation. When they are stricken, what remains is a public park.

It is worth pointing out that there lurks in this argument no problem about the retroactivity of *Brown v. Board of Education*, 347 U.S. 483 (1954) and its sequel cases, outlawing segregation even where "separate but equal" facilities were provided. The part of §69-504 which authorized racial exclusion, since it authorized the creation of city parks without provision for separate equal facilities, was unconstitutional on its face even under *Plessy v. Ferguson*, 163 U.S. 537 (1896). The exclusion of Negroes from Baconsfield, a public park run by the city, was unconstitutional even under *Plessy v. Ferguson*, *supra*, unless separate but equal facilities were provided; this record shows none. Senator Bacon's testamentary provision for exclusion of Negroes rested, then, on an unconstitutional statute, and both contemplated and induced an unconsti-

tutional action by Macon—under 1910 standards as well as under 1969 standards. It would seem reasonable to treat a provision so sandwiched as though it were itself unconstitutional, and to strike it out as a matter of federal law, as one would strike out the part of §69-504 on which it rested, and the discrimination it contemplated and created.

This conclusion, in a deep but true sense, may be seen to rest on the philosophy of *Marsh v. Alabama*, 326 U.S. 501 (1946). That case held that, where a person dedicates his or its property to the public, or to a governmental use, there attaches an obligation to respond to the norms of the Constitution, as these regulates governmental action. It would be harmonious with this philosophy to hold that as soon as a testator, like Bacon, publishes a will dedicating his property to serve as a public park, and even goes so far as to make the City of Macon his trustee for this purpose, so as to effect the incorporation of his rules for running the park into the City's own fabric of law, then these directions, if repugnant to the Constitution, are to be treated as official rules repugnant to the Constitution are treated—by looking on them as null and void. A constitution which forces color-blindness on the city ought to be held to force color-blindness on one who proposes to use and succeeds in using the city as agent of his will.

More in fairness to Senator Bacon's memory than in strict relevance to this point, it should again be emphasized that there is no reason whatever for thinking that Senator Bacon would have disagreed. We simply have no way of knowing whether, if he had been told that this park could not be operated at all on a discriminatory basis, he would have chosen that it be operated for all. Treating his racial directions as *pro non scripto*, as the nullities they would unquestionably be if considered as sections in a city code, may, for all we know, do far

less violence to what his wish would have been than is done by the Georgia court in awarding Baconfield to his heirs, for such fate as marketable city property may have—including likely occupancy, and even ownership, by Negroes. The choice to overthrow his scheme *in toto* is not one that can be justified by respect for the wishes of a dead man; his choice, among the choices now open, is not knowable or even probably inferable. The choice is solely that of the 1968 Georgia court. And it is submitted that as a matter of federal law that court ought to be held to treating the racial exclusionary provisions as nullities.

The underlying assumption, in the very similar case of *Commonwealth of Pennsylvania v. Brown*, 392 F.2d 120 (3rd Cir. 1968), cert. den. 391 U.S. 921 (1968), involving the Girard College Trust seems clearly to be that the word "white," in a will turning property over to the public for a public use, is to be treated as a nullity. It seems unthinkable that the court uttering such a judgment could hold that, after all, the Girard property may revert to his heirs. Cf. *Sweet Briar Institute v. Button*, 280 F. Supp. 312 (W.D. Va. 1967), rev'd *per curiam*, 387 U.S. 423, decision on the merits, 280 F. Supp. 312 (1967).

Another and rather closely parallel route to considering this racially restrictive language as a nullity is to be found in the fact that this park, having unquestionably been "dedicated" to the white public, must, as a result of the federal command of equality, be taken to have been "dedicated" to the Negro public as well.

The regular way of creating a public park in Georgia, prior to the enactment of Georgia Code §69-504, was by dedication to the public, with reciprocal public easements. See *Macon v. Franklin*, 12 Ga. 239, and the summary

on this point in this Court's opinion in this same case, *Evans v. Newton*, 382 U.S. 296, 300, n. 3 (1966).

Section 69-504, enacted in 1905, while permitting racial discrimination, expressly retains the concept of "dedication":

Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance *dedicated in perpetuity* to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.)
(Emphasis added.)

Now, when this park passed into the trusteeship of the city of Macon, thereupon it became the fixed right of all Negro citizens of Macon to be treated, with respect to their rights in the park, just as the white citizens were treated. This record shows no "separate but equal" facilities in 1914 or at any other time. The enjoyment of easements by whites, but not by Negroes, in a park under city trusteeship, was therefore unconstitutional

even under *Plessy v. Ferguson*. (See *supra*, pp. 51-52.) It can make no difference that Negroes were not positioned in knowledge or in power to enjoy their rights.

But even if it be thought that this arrangement was not unconstitutional under *Plessy*, and even if (contrary to the general rule) *Brown v. Board of Education, supra*, and cases following are not taken as declaring the rule that had been correct all along, but only of force prospectively, it is nevertheless indisputable that, at some time years prior to this litigation's commencement, it became clear that as a matter of federal constitutional law, the Negro citizens of Macon must possess, in respect of this city—trusteed park, just exactly the same rights as the white citizens of Macon. Since it cannot be contested that the park was "dedicated" to the use of the latter, it must equally, by operation of federal law, be taken to be "dedicated" to the use of the former—not because Georgia law commanded that result, not because Senator Bacon intended that result, but because federal law, in commanding equality, necessarily commanded that result.

All interested parties, including the parties to this litigation, have acted all along, since the question was first raised, on the assumption that discrimination while the City was trustee was clearly unconstitutional. But it has not been so clearly noted that, as a corollary of this proposition, it must be true, since the park was under §69-504 and Senator Bacon's will unquestionably "dedicated" in perpetuity to the whites, by operation of the federal command of equality, the park stands "dedicated" in perpetuity to the Negroes as well.

Since the point of "dedication" was raised in the assignments of error in the Georgia Supreme Court, and since it was fully briefed there, it is surprising to find

that it is not dealt with in that court's opinion. There is a brief reference in the opinion to the Order and Decree of the Bibb County Court; the passage referred to is thus the only place one can look for a reasoned statement of the Georgia court's grounds for rejecting the "dedication" argument:

It is clear that the testator sought to benefit [the whites] and the language of the will clearly indicates that the limitation to this class of persons, was an essential and indispensable part of the testator's plan for Baconsfield. There has been no dedication of Baconsfield as a park for the use of the general public.

It is petitioners' contention, as just set out, that this conclusion is wrong, not as a matter of state law, but as a matter of federal law, for the precise reason that it takes no account of the fact that federal law commanded equal rights—whether as holders of easements, or as beneficiaries of "dedication"—for Negroes. As a net integral sum, adding the effect of Bacon's will, under Georgia law, to the effect of federal law on the situation thus created, Baconsfield was "dedicated" to all.

If Baconsfield, then, by the joint operation of Georgia and federal law, was "dedicated" to use as a park by whites and by non-whites, then it seems plain that under Georgia law that dedication is not retractable. Granting *arguendo* that the "purpose" of Senator Bacon's *trust* has failed (but see above, point B), the *uses* to which the park is "dedicated" have not failed.

Some confusion may be created by the juxtaposition of the concepts of "dedication" and "trust." These concepts are not at war under Georgia law—or, for that matter, under Anglo-American law in general. Section

69-504, just quoted, makes it plain that Georgia law sees no difficulty in lands being *both* under trusteeship and dedicated to the public. For the "appropriate conveyance" under §69-504 may be in fee simple or in trust, but which ever of these sorts of conveyances is chosen, the lands are to be "dedicated in perpetuity to the public use. . . ." There is no difficulty about this double aspect of the creation of a park. The legal title to land may be held by a trustee, and the duties of his (or its) trusteeship may include, for example, maintenance, while simultaneously the land may be "dedicated" to the public, with public easements upon it. These arrangements are complementary and not contradictory. Somebody, whether or not a trustee, always holds underlying title to land over which easements run.

The holding, then, that Baconsfield was not treated as "dedicated" to the public, with all that must imply under Georgia law, rests essentially on a wrong reading or disregard of the federal command of equality. Such a holding obviously cannot be allowed to stand.

The thoroughness of the "dedication" in this case is emphasized (if emphasis be needed) by reference to the public subsidies and aids this park has received. The record abounds with details of maintenance, tax exemption, and even substantial federal aid. State power compelled and solicited these aids, and can have done so only on the theory that the park was "dedicated" as a park. It would be anomalous in the extreme for that same state power, acting through a different agency, now to be allowed to say that this park was not, after all, "dedicated" to a public use. And if it was dedicated to a public use, it was necessarily dedicated to use by all races, under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons it is respectfully submitted
that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TOPICAL INDEX

For the convenience of the reader, the following index is given:

TOPICAL INDEX

Letter Opinion of Superior Court

State of Georgia

SUPERIOR COURTS OF THE MACON JUDICIAL CIRCUIT

Macon, Georgia

December 1, 1967

Chamber of:

Hal Bell

C. Cloud Morgan

Geo. B. Culpepper, III

Judges

Bibb, Crawford
Peach and Houston
Counties

Mr. Willis Spark, III

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Macon, Georgia

Letter Opinion of Superior Court

Honorable George J. Hearn, III
Assistant Attorney General
State Capitol
Atlanta, Georgia

Re: Charles E. Newton, et al
v. City of Macon
(Renewed Baconsfield Proceeding)
No. 25864, Bibb Superior Court

Gentlemen:

In passing upon the motion for summary judgment filed by the heirs of Senator Bacon I see no need to recite any of the pleadings, history or rulings of this Court, the Supreme Court of Georgia, or the Supreme Court of the United States, except as they may bear directly upon the issue raised by the motion.

The final order and decree of this court of March 10, 1964, was appealed to and affirmed by the Supreme Court of Georgia on September 28, 1964, and on writ of certiorari the United States Supreme Court reversed the judgment of the Supreme Court of Georgia on January 17, 1966. Thereafter on March 14, 1966, the judgment of the United States Supreme Court was made the judgment of the Supreme Court of Georgia, reversing and vacating the prior judgment of this Court. The Georgia Supreme Court remanded the case of this court for further proceedings consistent with the decision of the United States Supreme Court and specifically directed this court to pass on contentions of the parties not passed on previously.

In its decision of June 17, 1966 the United States Supreme Court ruled that Baconsfield could no longer be

Letter Opinion of Superior Court

operated for the exclusive benefit of white persons and ruled this was so whether the City of Macon remained as trustee or whether private trustees were appointed.

Movants contend that because of the January 17, 1966 decision of the United States Supreme Court Senator Bacon's trust became unenforceable and Baconsfield and the funds held for its support reverted at that time into Bacon's estate by operation of law. They contend further that the Supreme Court of Georgia on March 14, 1966 recognized this had occurred when the court expressed the opinion that the "sole purpose for which this trust was created has been terminated." Movants contend that this judgment of the Supreme Court of Georgia declaring what had transpired in regard to the title is now the law of the case and further that it remains only for this court at this time to give effect to said reversion of title.

Other relief sought in the motion for summary judgment is briefly stated as follows:

- (1) The dismissal of the City of Macon as not now being a necessary party to this proceeding,
- (2) An order allowing the Successor Trustees, Hugh M. Comer, Lawton Miller and B. L. Register to be relieved of any further duties except to account for the legal title to the trust properties, assets, etc.
- (3) That the members of the Board of Managers be allowed to file an accounting of their acts and of the funds in their hands and then be released and acquitted from further liability,
- (4) That one or more persons be appointed to take possession and custody of the properties, assets and funds of the charitable trust and to protect and manage the same

Letter Opinion of Superior Court

under the further orders and directions of this Court and to transfer the title thereto and possession to the persons entitled to receive the same and

(5) That the relief prayed for by intervenors, Reverend E. S. Evans, et al, be denied.

Intervenors, Reverend E. S. Evans, et al, the only parties to object, appeared and filed objections to the motion for summary judgment and submitted evidence concerning the expenditure of tax monies of the City in the operation and maintenance of Baconsfield Park and in the building of a swimming pool located on the property. Evidence was also offered concerning the expenditure of funds by the Federal Government under the W.P.A. program in the furnishing of labor in the construction of Baconsfield clubhouse.

With reference to the evidence submitted by both the intervenors and movants there is little, if any, dispute as to the facts. The evidence is conclusive that Baconsfield park was at all time under the direct control and supervision of the Board of Managers and that funds realized from the handling of commercial properties were used in the improvement and operation of the park.

I have carefully considered the pleadings, the evidence and the brief of argument submitted by counsel for the intervenors, Reverend E. S. Evans, et al, and also the pleadings, the evidence and the brief of argument submitted by counsel for the Bacon heirs.

It is my considered opinion that when the Supreme Court of the United States rendered its decision in *Evans v. Newton*, 382 U. S. 296, 86 S. Ct. 486, 15 L.E. 2nd, 373 (1966) holding in a divided opinion that Baconsfield might not in the future be operated as a facility for the sole benefit of white persons, as specified in Senator Bacon's will, the

Letter Opinion of Superior Court

trust failed, and the property reverted to Bacon's estate by operation of law.

It is my opinion, contrary to the contention of counsel for the intervenors, Reverend E. S. Evans, et al, that the doctrine of *civ pres* is not applicable to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys, and white children of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield.

I have considered the argument of counsel for the intervenors, Reverend E. S. Evans, et al, concerning their contention that "Baconsfield Park has been dedicated to the public and a public easement has been created which cannot be defeated merely by the termination of the trust". In my opinion it is clear that there has been no dedication of Baconsfield as a park for the use of the general public. The trust was created for a limited purpose, i.e., for the sole, perpetual and unending, use benefit and enjoyment of the white women, white girls, white boys and white children of Macon. It is therefore my opinion that the concept of dedication raised by counsel for the intervenors is without application in this case.

With reference to the contention of the intervenors in regard to the Bacon heirs being estopped, there is nothing in the record to support this contention.

It is my opinion that *Shelley vs Kramer* does not support the position of the intervenors. It is further my opinion that

Letter Opinion of Superior Court

no federal question is presented in regard to the reversion of Baconsfield, but rather this property has reversed by operation of law in accordance with well settled principles of Georgia property law.

Counsel for the Bacon heirs will please prepare an order in accordance with the above for the Court's consideration, furnishing a copy of the same to counsel for the other parties.

Yours very truly,

O. L. LONG

O. L. Long, J.S.C.M.C. Emeritus

Filed in Office, 14 day of May, 1968
Lillian Lavine, Deputy Clerk

Superior Court Order and Decree

IN THE
SUPERIOR COURT
OF BIBB COUNTY, GEORGIA
No. 25864

CHARLES E. NEWTON, *et al.*,

—v.—

CITY OF MACON, *et al.*

ORDER AND DECREE

The above case was heard on Motion for Summary Judgment filed November 10, 1966, in behalf of Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee as Successor Trustees under Item 6th of the will of Augustus Octavius Bacon, deceased, who for convenience will be referred to as Senator Bacon. Said case was heard upon remand from the Supreme Court of Georgia for further proceedings in this Court consistent with its decision and with the decision of the Supreme Court of the United States of January 17, 1966, with specific direction to this Court to pass on contentions of the parties not passed on previously.

Said Motion and the rule nisi issued thereon were duly served upon all parties and responses thereto were filed. Various witnesses were examined by deposition and both supporting and opposition affidavits were filed. Additional parties were made and the Motion was duly assigned for

Superior Court Order and Decree

hearing and was heard in open court. The parties through their respective counsel made oral arguments and within the time allowed for that purpose by the Court filed written briefs, all of which were carefully considered.

Having taken the case under consideration the Court on December 1, 1967, advised all attorneys of record by letter of its findings and conclusions. A copy of said letter of December 1, 1967, is filed with the Clerk as a part of the record in said case, and by reference is incorporated herein as findings and conclusions of the Court. This decree is entered pursuant to and in accordance with the findings and conclusions therein and herein made.

IT IS NOW, THEREFORE, CONSIDERED, ORDERED AND DECREED BY THE COURT AS FOLLOWS:

(1) The Court has jurisdiction of the subject matter of the case and of the parties, and all necessary parties are properly before the Court. All parties have been given opportunity to be heard, and to present either supporting or opposition affidavits or responses, and all parties have been heard upon the issues involved.

(2) Rev. E. S. Evans and others as members of the Negro race were allowed to intervene in opposition to the complaint on behalf of themselves and other Negroes similarly situated as a class, and as intervenors to challenge the validity of certain of the provisions of the will of Senator Bacon and to seek relief against the petitioners. Upon appeal by them from the prior judgment of this Court the Supreme Court of the United States on January 17, 1966, ruled that Baconsfield Park could no longer be operated for the exclusive benefit of white persons as clearly provided by Senator Bacon's will, and that ruling

Superior Court Order and Decree

is now the law of this case. Consistent with the further provisions of this decree no sufficient cause is shown for the grant of other or further relief to said intervenors, and the relief prayed for by them is denied.

(3) By virtue of and upon the aforesaid decision of the United States Supreme Court of January 17, 1966, the essential purpose of the trust established by Items 9th and 10th of Senator Bacon's will was voided and became impossible of performance and said trust thereupon failed and was terminated.

The Court finds and concludes, contrary to the contention of counsel for the intervenors, Reverend E. S. Evans, et al., that the doctrine of *cy pres* is not applicable to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys, and white children of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield.

The Court has considered the argument of counsel for the intervenors, Reverend E. S. Evans, et al., concerning their contention that "Baconsfield Park has been dedicated to the public and a public easement has been created which cannot be defeated merely by the termination of the trust." It is clear that there has been no dedication of Baconsfield as a park for the use of the general public. The trust was created for a limited purpose, i.e., for the sole, per-

Superior Court Order and Decree

petual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of Macon. It is therefore the Court's conclusion that the concept of dedication raised by counsel for the intervenors is without application in this case.

With reference to the contention of the intervenors in regard to the Bacon heirs being estopped, there is nothing in the record to support this contention.

It is my opinion that *Shelley vs. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), does not support the position of the intervenors. It is further my opinion that no federal question is presented in regard to the reversion of Baconsfield, but rather this property has reverted by operation of law in accordance with well settled principles of Georgia property law.

Under the laws of the State of Georgia on January 17, 1966, the title to and right to possession of the trust assets reverted automatically by operation of law to Senator Bacon, or to his heirs or estate, and it is declared and adjudged that such title to and right to possession has so reverted.

(4) Under the decision and mandate of the Supreme Court of Georgia reversing the prior judgment of this Court the trust property was left without a trustee. In view of the failure and termination of said trust and the reversion by operation of law of the trust assets, it is not necessary that there be a trustee.

(5) The prior order of this Court accepting the resignation of the City of Macon as Trustee and appointing Successor Trustees is vacated. Nevertheless, since the City of Macon has no trust assets in its hands to be ac-

Superior Court Order and Decree

counted for, and has reaffirmed its resignation and has again announced its refusal to serve as Trustee, and requested its discharge from the case, no further order of this Court with respect to the resignation of the City of Macon is necessary. The City of Macon having no further trust duties to perform or trust assets to be accounted for is dismissed as a party to this case.

(6) The Successor Trustees who were appointed by this Court have acted under their appointment as de facto Trustees and their acts and doings in that capacity are ratified and approved insofar as they have acted in accordance with the direction and authority given to them by virtue of their appointment. Specifically this includes the appointment by them of the Board of Managers to perform the duties and functions imposed upon the Board of Managers established under Senator Bacon's will and the acts and doings of said Board of Managers are similarly ratified and approved insofar as they have acted in accordance with the terms of Senator Bacon's will applicable to them and under the authority and directions given to them by this Court.

(7) The Successor Trustees appointed by this Court and the Board of Managers appointed by them with the approval of this Court shall within thirty days after the date of this order file in the office of the Clerk of this Court detailed reports of their acts and doings in their respective capacities, (1) listing and identifying the trust assets, properties and funds in their hands, and (2) showing and accounting for their receipts and disbursements. Objections to said reports and accountings may be made by any party desiring to object thereto within thirty days from

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the date of the filing of said reports and accountings, and upon the expiration of said periods of time said reports and accountings shall be submitted to the Court for its approval or disapproval. Copies of said reports and accountings shall be served upon all attorneys of record in this case who shall be notified of the date of filing and of the time within which objections thereto may be filed. Upon approval of such reports and accountings the Successor Trustees appointed by this Court and the Board of Managers appointed by them shall be thereupon discharged and dismissed as parties to this litigation.

(8) For the purpose of receiving the reports and accountings to be made by the Successor Trustees and by the Board of Managers, as above described, and for the further purpose of preserving and administering the assets, property and funds until this decree becomes final, Guyton G. Abney and Willis B. Sparks, Jr. are named and appointed as Receivers. Copies of said reports and accountings shall be served upon them as upon other parties, and objections thereto may be filed by them as by other parties. Upon the filing of said reports and accountings all cash funds and other assets of the trust shall be paid over to the Receivers and received for by said Receivers, to be held and administered by them under the further direction of this court.

(9) Said Receivers are authorized and empowered to hold and manage the trust properties and assets under the further orders and directions of the Court until such time as they are directed by this Court to deliver and pay them over to the person or persons entitled thereto after this decree has become final. The Receivers are authorized

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to recognize and continue in effect any and all contracts or other commitments with respect to the trust properties heretofore entered into or made by the Successor Trustees, or their predecessor trustee, or by the Board of Managers at any time and however constituted, whether de jure or de facto, and to enter into other contracts and commitments normally incident to the management and preservation of the trust properties which are limited in duration to not exceeding one year, all without the necessity of seeking further direction by or approval of the Court. Subject to the right of any party to this case to file objections thereto which will be heard by the Court, the Receivers may apply for and obtain authority to enter into contracts and commitments extending longer than one year.

(10) The aforesaid Successor Trustees and members of the Board of Managers shall not receive any compensation for services heretofore or hereafter rendered by them but shall be allowed all reasonable and proper costs and expenses which they have incurred, including the cost and expense of employing agents or other employees in the performance of their duties, and including costs, expenses and obligations incurred by them in the conduct of this litigation, specifically including the compensation of attorneys employed by them, or by their predecessors, in the conduct of this litigation or in connection with the management and operation of the properties and assets of said trust. Application shall be made to this Court for the approval of the compensation to be paid to their attorneys, and appropriate order will be made for such payment either out of the funds in the hands of the Receivers or as a charge upon the properties and assets in

Superior Court Order and Decree

the hands of the persons to whom said assets are distributed.

(11) The costs of this proceeding to be taxed by the Clerk including all prior costs on appeal are assessed against the properties in the hands of the Receivers and shall be paid out of these assets.

(12) Said trust having failed and terminated and the title to said assets having reverted by operation of law it is determined and decreed by the Court that said title has by operation of law vested as follows:

(a) One-half interest in Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as Successor Trustees under Item 6th of the will of Senator Bacon for the benefit for life of Shirley Holcomb Curry, Marie Louise Lamar Curry and Manley Lamar Bacon Curry, surviving children of Augusta Lamar Bacon, deceased, and upon their deaths as provided therein.

(b) The remaining one-half thereof in equal shares in fee simple in Willis B. Sparks, Jr., Virginia Lamar Sparks, M. Garten Sparks and in The Citizens and Southern National Bank and Willis B. Sparks, Jr. as Executors of the Will of A. O. B. Sparks, deceased.

(13) This Court retains jurisdiction of this case for the purpose of acting upon the reports and accountings to be made by the Successor Trustees and successor Board of Managers, and giving direction with reference thereto, for the purpose of acting upon all applications of attorneys and others for compensation payable to them, for the purpose of receiving and acting upon reports and appli-

Superior Court Order and Decree

cations to be made by the Receivers appointed by this Court as hereinabove provided, and fixing their compensation, for any other or further decree or order of this Court necessary or appropriate to the enforcement of this decree, and for any other purpose not inconsistent with the provisions of this decree.

This 14 day of May, 1968.

O. L. LONG
J.S.C.M.C., Emeritus

Opinion of Georgia Supreme Court

Supreme Court of Georgia

Decided DEC—5 1968

24782. EVANS et al. v. ABNEY, Trustee, et al.

The trial court did not err in entering a summary judgment holding that the trust created by the will of Senator A. O. Bacon had failed and that the trust property reverted to his heirs.

ARGUED SEPTEMBER 9, 1968—DECIDED DECEMBER 5, 1968.

Equitable petition; trust. Bibb Superior Court. Before Judge Long, Emeritus.

William H. Alexander, Jack Greenberg, James M. Nabrit, III, for appellants.

Jones, Cork, Miller & Benton, Charles M. Cork, Frank C. Jones, Timothy K. Adams, Trammell F. F. Shi, George C. Grant, Arthur K. Bolton, Attorney General, for appellees.

MOBLEY, Justice. This appeal is from an order of Bibb Superior Court which held that a trust created by Senator A. O. Bacon in his will dated March 28, 1911, providing for a park in the City of Macon, to be called Baconsfield, for the benefit of "white women, white girls, white boys and white children of the City of Macon," had failed and the property would revert by operation of law to the heirs at law of Senator Bacon.

The litigation was commenced in May, 1963, when Charles E. Newton and others, as members of the Board of Managers of Baconsfield, brought a petition against the City of Macon, as trustee under the will of Senator Bacon, and Guyton G. Abney and others, as successor trustees under

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the will, holding assets for the benefit of residuary beneficiaries, asserting that the City of Macon was failing and refusing to enforce the provisions of the will with respect to the exclusive use of Baconsfield, and praying that the city be removed as a trustee. Reverend E. S. Evans and others, Negro residents of the City of Macon, on behalf of themselves and other Negroes similarly situated, filed an intervention, contending that the restriction in the trust limiting the use of the park to white women and children was illegal, and praying hat the general charitable purpose of the testator be effectuated by refusing to appoint private persons as trustees. The heirs at law of Senator Bacon also intervened, praying that, if the relief sought by the original petitioners not be granted, the property revert to the heirs. The City of Macon in its answer alleged that it could not legally enforce segregation. The city later amended its answer, alleging that it had by resolution resigned as trustee under the will, and praying that its resignation be accepted by the court. The superior court accepted this resignation by the City of Macon and appointed new trustees. On appeal by the Negro intervenors from this judgment, this court affirmed the judgment of the trial court. For a full statement of the pleadings see *Evans v. Newton*, 220 Ga. 280 (138 SE2d 573).

The Supreme Court of the United States granted writ of certiorari and reversed the judgment of this court, holding in part: "Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. We may fairly assume that had the Georgia courts been of the view that even in private hands the park may not be operated for

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the public on a segregated basis, the resignation would not have been approved and private trustees appointed. We put the matter that way because on this record we cannot say that the transfer of title per se disentangled the park from segregation under the municipal regime that long controlled it." *Evans v. Newton*, 383 U.S. 296, 302 (86 SC 486, 15 LE2d 373).

The judgment of the Supreme Court of the United States was made the judgment of this court. The opinion of this court remanding the case to the trial court was in part as follows: "When this case was before us for review, we sustained the orders of the trial judge accepting the resignation of the City of Macon as trustee of Baconsfield and appointing new trustees. The Supreme Court of the United States, in the general reversal of the judgment of this court, did not, in the majority opinion, make any specific ruling on the right of the City of Macon to resign as trustee or that new trustees could not be appointed. The resignation of the City of Macon as trustee of Baconsfield because of its inability to carry out the provisions of the trust being an accomplished fact (and we know of no law that could compel it to act as trustee) and the order of the court appointing new trustees having been reversed, the trust property is without a trustee. Even if new trustees were appointed, they would be compelled to operate and maintain the park as to Whites and Negroes on a non-discriminatory basis which would be contrary to and in violation of the specific purpose of the trust property as provided in the will of Senator Bacon. Under these circumstances, we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated. See

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Restatement (Second), Trusts §335. 'Where a trust is expressly created . . . [and] fail[s] from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.' *Code* §108-106(4))." *Evans v. Newton*, 221 Ga. 870 (148 SE2d 329).

On remand of the case to the Superior Court of Bibb County, a motion for summary judgment was filed by Guyton G. Abney and others, as successor trustees under the will of Senator Bacon. After consideration of depositions and affidavits, the Superior Court of Bibb County entered a summary judgment decreeing as follows: The relief prayed by Reverend E. S. Evans and other Negro intervenors is denied. Under the decision of the United States Supreme Court the essential purpose of the trust creating Baconsfield in Senator Bacon's will has become impossible of performance, and the trust has failed and is terminated. The doctrine of *cy pres* is not applicable to the trust creating Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, white women and children of Macon, and the language of the will clearly indicates that the limitation to this class of persons was an essential and indispensable part of the testator's plan for Baconsfield. There has been no dedication of Baconsfield as a park for the use of the general public. There is nothing in the record to support the contention that the Bacon heirs are estopped from claiming a reversion to them. The property has reverted by operation of law to these heirs. In view of the termination of the trust, it is not necessary that there be a trustee. The City of Macon having no further trust duties to perform or trust assets to account for, is dismissed as a party to the case. Certain acts and doings of the *de facto* successor trustees are

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ratified and approved. Receivers are appointed. The title to the assets of the trust property are decreed to be in the heirs at law of Senator Bacon.

The Negro intervenors appealed from this judgment, enumerating as error each of the findings of the trial court, and the failure to find that Baconsfield should be operated as a public park on a non-discriminatory basis. The intervenors contend that they have been denied due process of law and equal protection of the laws under the Constitution of the United States by the rulings made, and that the judgment does not follow the mandate of the Supreme Court of the United States.

1. The intervenors urge that the doctrine of *cy pres* should be applied to Senator Bacon's will, and that the nearest effectuation of the intention of Senator Bacon would be to operate the park for the benefit of all citizens of the City of Macon. The doctrine of *cy pres* is expressed by *Code* §108-202 as follows: "When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention."

Senator Bacon in the provision of his will creating Baconsfield was specific in listing the persons for whose benefit the trust was created, the beneficiaries being "the white women, white girls, white boys and white children of the City of Macon." He empowered the board of managers to exercise their discretion in also admitting "white men of the City of Macon, and white persons of other communities." He left no doubt as to his wish that the park be operated on a segregated basis. After expressing

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his kind feelings toward persons of the Negro race, he stated his reasons for limiting the beneficiaries of the trust to white persons as follows: "I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

The doctrine of *cy pres* can not be applied to establish a trust for an entirely different purpose from that intended by the testator. *Ford v. Thomas*, 111 Ga. 493 (36 SE 841). In the opinion of this court remanding the case to Bibb Superior Court it was held that the sole purpose for which the trust was created had become impossible of accomplishment and the trust had terminated. This was, in effect, a determination that the doctrine of *cy pres* could not be applied to Senator Bacon's will so as to authorize the operation of the park for the benefit of the public generally. The intervenors sought no review of this ruling by the Supreme Court of the United States, and it has become the law of the case. The ruling now under review that the doctrine of *cy pres* can not be applied is consistent with the opinion of this court in *Evans v. Newton*, 221 Ga. 870, *supra*.

2. It is contended by the intervenors that Baconsfield was created under the provisions of Code § 69-504, authorizing any person to convey, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, lands for park or pleasure grounds, limited to the use of one race only, or women and children of one race only, and that this Code section violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. To hold that the trust provision of Senator Bacon's will was made pursuant to an unconstitutional

Opinion of Georgia Supreme Court

Code section, would have the effect of making the trust impossible of performance (*Smith v. DuBose*, 78 Ga. 413, 434) (3 SE 309, 6 ASR 260), and thus cause a reversion under Code § 108-106 (4).

3. It is contended by the intervenors that Senator Bacon's will should be construed to grant all reversionary interest in Baconsfield to the City of Macon. This assertion is based on language in the will vesting all title and interest, "including all remainders and reversions," to the City of Macon in trust for the persons specified.

Senator Bacon devised a life estate in the trust property to his wife and two daughters, and the language pointed out by the intervenors appears in the following provision of the will: "When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust etc." This language concerned remainders and reversions prior to the vesting of the legal title in the City of Macon, as trustee, and not to remainders and reversions occurring because of a failure of the trust, which Senator Bacon apparently did not contemplate, and for which he made no provision. The reversion to the heirs at law is not under the terms of his will but occurs because of the provision of our law that where an express trust fails from

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any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs. *Code* § 108-106 (4).

4. It is asserted that the City of Macon acquired all of the interest in Baconsfield of the heirs and trustees of Senator Bacon by a deed dated February 4, 1920, and that the heirs and trustees are now estopped from asserting an interest in Baconsfield. This position is not tenable. The City of Macon does not assert that it has fee simple title to Baconsfield. Senator Bacon in Item 9 of his will designated certain property of his estate to form the park to be known as Baconsfield. This property was placed in trust in the hands of named trustees, first for the benefit of his wife and two daughters, and after their death, for recreational uses of white women and children. The testator expressly denied the trustee any right to sell the trust property. The deed of the trustees dated February 4, 1920, was made in consideration of \$1,665 annually during the life of the remaining daughter of Senator Bacon and the expenditure of \$650 annually by the city for the improvement of the park, and its purpose was to allow the city to develop the property as a recreational area prior to the death of the remaining life tenant. It did not purport to convey any reversionary interest of heirs of Senator Bacon in the event the recreational park trust should terminate.

5. It is contended that, in obedience to the mandate of the United States Supreme Court, the City of Macon should be ordered re-instated as trustee of Baconsfield and directed to operate the park on a nonsegregated basis. The opinion of the Supreme Court of the United States held that the park could not be operated for the public on a

Opinion of Georgia Supreme Court

segregated basis and generally reversed the judgment of this court affirming the judgment accepting the resignation of the City of Macon as trustee and appointing new trustees. The United States Supreme Court did not decide the question of whether the trust would terminate because of the inability of the trustees to effectuate the testator's purpose in creating the trust. With the termination of the trust, there is no question as to the right of the City of Macon to resign as trustee, since there can be no trustee without a trust to administer. Neither can there be an estoppel against the acceptance of the city's resignation as a trustee, where the trust has terminated, because of the expenditure of public money in the development of the park. Compare *Bennett v. Davis*, 201 Ga. 58 (39 SE2d 3).

6. The intervenors urge that they have been denied designated constitutional rights by the judgment of the Superior Court of Bibb County holding that the trust has failed and the property has reverted to Senator Bacon's estate by operation of law. We recognize the rule announced in *Shelley v. Kraemer*, 334 U.S. 1 (68 SC 836, 92 LE1161, 3 ALR2d 441), that it is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution for a state court to enforce a private agreement to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. That case has no application to the facts of the present case.

Senator Bacon by his will selected a group of people, the white women and children of the City of Macon, to be the objects of his bounty in providing them with a recreational area. The intervenors were never objects of his bounty, and they never acquired any rights in the recrea-

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tional area. They have not been deprived of their right to inherit, because they were given no inheritance.

The action of the trial court in declaring that the trust has failed, and that, under the laws of Georgia, the property has reverted to Senator Bacon's heirs, is not action by a state court enforcing racially discriminatory provisions. The original action by the Board of Managers of Baconsfield seeking to have the trust executed in accordance with the purpose of the testator has been defeated. It then was incumbent on the trial court to determine what disposition should be made of the property. The court correctly held that the property reverted to the heirs at law of Senator Bacon.

Judgment affirmed. All the Justices concur.

Order of Georgia Supreme Court

SUPREME COURT OF GEORGIA

ATLANTA, December 5, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

E. S. Evans et al. v. Guyton G. Abney, Trustee, et al.

This case came before this court upon an appeal from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. ~~2000~~ 60

REVEREND E. S. EVANS, et al.,
Petitioners,

v.

GUYTON G. ABNEY, et al.,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari
to the Supreme Court of Georgia.

FRANK C. JONES,
TIMOTHY K. ADAMS,
CHARLES M. CORK,
500 First National Bank Building,
Macon, Georgia 31201,
Attorneys for Respondents.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1106.

REVEREND E. S. EVANS, et al.,
Petitioners,

v.

GUYTON G. ABNEY, et al.,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari
to the Supreme Court of Georgia.

QUESTION PRESENTED

Where a testator devises land in trust with the direction that said land be used as a park for the white persons,¹ and only for the white persons, of the community, and states as the reason for the racial limitation his positive disapproval of the two races using recreation grounds

¹ The property was devised in trust "for the sole . . . use of the white women, white girls, white boys, and white children of the City of Macon . . ." The Board of Managers in which management of the park was vested was given the authority to admit "the white men of the City of Macon and white persons of other communities."

together and in common, and where it is subsequently held by the United States Supreme Court that the property cannot continue to be used as a park for white persons only, are Negro citizens of the community denied any Federal constitutional rights by a judgment of a state court recognizing that (as a matter of state law and of the interpretation of the particular will under consideration) the trust has failed, and the property has reverted to the heirs of the testator?

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of the case contained in the opinion of the Supreme Court of Georgia, which opinion is included in the appendix to the Petition for Writ of Certiorari (Petition, P. 16a et seq.). Generally speaking, and except as hereinafter commented upon, petitioners have made a relatively accurate summary of most of the evidence which is in the record. However, as far as the issues are concerned, we view the great bulk of material in the record as being largely, if not entirely, irrelevant. This is so because the disposition of this case in the Georgia courts was controlled by the clear and unambiguous terms of the will of A. O. Bacon interpreted in the light of well-settled principles of Georgia law.

Petitioners state at page 5 of their petition that the Baconsfield property was "left to the City of Macon". Since petitioners have, throughout this litigation, tended to overemphasize and exaggerate the role of the City, it should be noted that the property was not devised to the City of Macon outright, but instead the City's interest in the property was as the passive title holder, and the use of the property was subject to certain specific conditions (as well as the continuing control of the Board of Managers).

Petitioners are in error when they state on page 7 that the motion of respondents in Bibb Superior Court asked that court to "rule that Senator Bacon's trust had become unenforceable, and that the Baconsfield property had reverted . . .". That the trust had become unenforceable had already been recognized by the Georgia Supreme Court and respondents' motion for summary judgment took note of this:

"On January 17, 1966, Bacon's trust became unenforceable and the funds held for its support re-

verted at that time into Bacon's estate by operation of law. On March 14, 1966, the Georgia Supreme Court recognized that this had occurred, saying, 'We are of the opinion that the sole purpose for which this trust was created has been terminated.' This judgment declaring what had transpired in regard to the title is now the law of the case. It remains only for this court at this time to give effect to said reversion of title." Respondents' Motion for Summary Judgment, paragraph 2 (R. 127).²

The "secondary contentions" which the Georgia Supreme Court directed Bibb Superior Court to consider, were those contentions resulting from the decision that the Baconsfield property could not be used in accordance with the provisions of Bacon's will, that the trust had failed and the property had reverted into Bacon's estate. The Georgia Supreme Court having ruled that the trust had failed and the property had reverted, the only real question before Bibb Superior Court involved a determination as to the individuals in whom title had vested by operation of law.

The Will

In view of the fundamental importance of Bacon's will, those passages from Items IX and X which are controlling are quoted herewith:

" . . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions of every estate in the

² Page references are to the record in the Georgia Supreme Court, as respondents do not have access to the record in the United States Supreme Court. The record in the United States Supreme Court is (for the most part) a photostatic copy of the record in the state court, and therefore the court will have before it the state court record's page numbers.

same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to

exclude at any time any person or persons of either sex, who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement, and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield (more particular description of property omitted), but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified . . .”

“. . . I take occasion to say that in limiting the use and enjoyment of the property perpetually to

white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

"I AM HOWEVER, WITHOUT HESITATION IN THE OPINION THAT IN THEIR SOCIAL RELATIONS THE TWO RACES SHOULD BE FOREVER SEPARATE AND THAT THEY SHOULD NOT HAVE PLEASURE OR RECREATION GROUNDS TO BE USED OR ENJOYED, TOGETHER AND IN COMMON. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified by my gratitude to and love for the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December, 1884, and Augustus Octavius Bacon, Jr., who died on the 27th day of the same year. And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated . . ."

". . . If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the Charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping

and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their Charter to hold in trust for the purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation . . . ”

“. . . As there will be no one of my descendants who now bears my name either by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community of which they once formed a happy part . . . ” (R. 14-21) (emphasis supplied).

The 1920 Deed

The statement on page 13 that “the City of Macon thus paid a total of \$41,625.00 to the trustees under Bacon’s will in order to acquire Baconsfield” is inaccurate. The City of Macon’s limited interest in the Baconsfield property was acquired by virtue of the provisions of Bacon’s will, and not because of the 1920 deed. Under the terms of Bacon’s will, the park was not to come into being until the deaths of Bacon’s wife and two children. However, the trustees and Bacon’s sole surviving daughter were apparently of the opinion that it would be desirable to proceed with an earlier development of Baconsfield than anticipated by Bacon’s will. Therefore, the trustees advised the City of Macon that they would permit the City to take possession of Baconsfield prior to the death of Bacon’s surviving daughter provided the City would agree to pay an annual rental during her lifetime (R. 689). Thus the sole purpose of the deed of February 4, 1920 was to permit

the development of Baconsfield as a park prior to the death of Bacon's surviving daughter (who had a beneficial life estate in the property).

City Activity

On page 14, petitioners state that the Superintendent of Parks of the City of Macon "exercised general supervision over Baconsfield for many years." This is not true. Baconsfield was "supervised" and operated by the Board of Managers which Bacon provided for in his will:

"The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same . . ." (R. 17).

The Board of Managers of Baconsfield functioned entirely independent of the City and it always exercised to the fullest those powers granted under Bacon's will. In none of its duties was the Board made answerable to the City; nor did the City, as Trustee, have the right to remove any member of the Board.

That the Board, and not the City, operated the park is evidenced by the minutes of the Board of Managers from 1936 to 1964. (See Intervenors' Exhibits "A" and "B", R. 361 et seq.) These minutes which take up approximately 150 pages and summarize action taken at some 53 separate meetings during the period covered show that the Board of Managers dealt with the minutest details of the operation of the park. Furthermore, a financial statement is attached to the minutes of each meeting and a rough calculation shows that a total of some \$95,000.00 was spent by the Board in the operation of the park. (These funds were derived from Bacon's commercial properties.)

Petitioners seem to try to create the impression that governmental units have constructed numerous physical

improvements on the park area. That this is not so is illustrated by the aerial photographs included in the record (R. 646-657). From these it may be seen that Baconsfield is largely a matter of trees, shrubbery and grass, with only one real structure upon it, to-wit, the Woman's Clubhouse (which itself comprises a very small portion of the park area).

Petitioners have greatly overemphasized the role of the City in the development of Baconsfield, especially when they attempt to convey the idea that City funds have been used to greatly enhance the value of the property. The activities of the City in assisting in the upkeep of the park, while beneficial, did little to increase the intrinsic value of the land. Also, it should be remembered that during this period of time a substantial number of taxpayers were entitled to use the park.

The pool which was constructed in 1948 was operated by the City pursuant to the terms of a lease agreement with the Board of Managers as lessor. Under the terms of the agreement, the Board could terminate the lease at will at two-year intervals, or by giving notice of a breach of any one of a number of stated conditions (See copy of lease attached to Amendment to Motion for Summary Judgment as Exhibit "D", R. 660). The relationship between the City of Macon and the Board of Managers was that of lessor and lessee. A fundamental element of such a relationship is that when the lease expires, or is terminated, any improvements that might have been made to the land will remain as a part of the land, and the lessee has no further rights or interest in either the land or the improvements.

We see no particular need to comment further on the statement of facts, except, perhaps to note once again that petitioners' "history" of Baconsfield Park had no bearing on the issues before the Georgia court.

REASONS FOR NOT GRANTING THE WRIT

Summary of Argument

The decision of the Georgia Supreme Court involved nothing more than the construction of a Georgia will in accordance with well-settled principles of Georgia law, and no rights guaranteed petitioners by the Fourteenth Amendment, or any other provision of the Federal Constitution, have been denied.

When A. O. Bacon devised his farm, "Baconsfield", to the City of Macon, in trust, he clearly provided that his property was to be used as a park **only** for the "white women . . . and white children of the City of Macon . . ."³ In limiting the use of the property to white persons, Bacon was not motivated by any feeling of hostility toward colored persons, nor was he prompted by a desire to be charitable only to persons of his own race. Instead, it was that as a matter of personal social philosophy Bacon was of the firm conviction that, "the two races should be forever separate and . . . should not have pleasure of recreation grounds to be used or enjoyed, together and in common."

Some fifty years after the probate of Bacon's will, this Court, in **Evans v. Newton**, 382 U. S. 296 (1966) ruled that Bacon's property could no longer continue to be used as a park for white persons only. Upon remand of the case to the Georgia Supreme Court, it then became the duty of that court to consider, and construe, Bacon's will in the light of the decision of this Court.

The Georgia court had before it two basic "facts", *viz.* (1) Bacon's clear expression of intention that he wanted his property used as a park only for white per-

³ See Footnote 1.

sons, and that he was opposed to his property being used as a park on an integrated basis and, (2) this Court's ruling that the property could not continue to be used as a park if it were not operated on an integrated basis. The purpose for which the trust had been established (to wit, a park for the **sole** use of the "white women . . . and white children of the City of Macon . . .") had obviously become impossible of accomplishment. Furthermore, that the use of Bacon's property for an integrated park would be directly contrary to Bacon's clearly expressed intention was a **fact** which the Georgia court had to accept. And it was a fact totally apart from the wisdom of Bacon's social philosophy; for the Georgia court was constrained to consider, not what it might want, but rather only what Bacon would have wanted. Under Georgia law, property devised in trust for a charitable use cannot be diverted from that use to one not intended or authorized by the testator, and *a fortiori*, it cannot be devoted to a use of which the testator has expressly stated he disapproves. Thus, as a matter of basic Georgia law, the court had to recognize that the purpose for which the trust had been established had become impossible of accomplishment, that the trust had failed, and that the property had reverted into Bacon's estate by operation of law.

In construing Bacon's will, it was incumbent upon the Georgia court to construe the will as a whole, and to consider all parts and provisions thereof, including those provisions which limited the use of Bacon's property to white persons. Contrary to the contention of petitioners, under no theory could the court have considered any provision of the will as being a "nullity". If a charitable trust fails because an indispensable provision of the trust is deemed to be unenforceable, the result is not an *ipso facto* elimination of that provision from the will, but instead it then becomes the duty of the court to decide

whether under the circumstances then existing *cy pres* should, or should not, be applied. Under no circumstances can the testator's intention simply be disregarded or ignored.

The Georgia court was correct in not applying *cy pres*, for this is an intent-enforcing doctrine and it can be applied only for the purpose of carrying out what probably would have been in accordance with the intention of the testator. It can never be applied where the result would be contrary to the express desire of the testator, and it cannot be denied that for Bacon's property to be used as a park open to both races would be directly contrary to his wishes.

Contrary to the contention of petitioners, the Georgia court was not concerned with whether Negroes might spoil the use of the park for white persons, or whether, as a matter of fact white persons would "enjoy" using the property as a park on an integrated basis. The court's only concern was whether such use would violate Bacon's restriction that the property be used by white persons only, and clearly it would.

No Federal rights have been denied petitioners, as the "Federal interest" of petitioners is no more than that if Baconsfield were continued in existence as a park, it would have to be operated on a non-discriminatory basis. This the Georgia Court recognized and accepted. There was no Federal requirement that the Georgia court construe Bacon's will in such a manner that would result in Baconsfield continuing as a park, when such construction would not be authorized by the will, and would be contrary to the laws of Georgia.

Any possible question of racial discrimination, or of impermissible state action, was eliminated by this Court's decision in **Evans v. Newton**, supra, for with the failure

of the trust, and the reversion of the property into the estate of A. O. Bacon, the property has been removed from the "public" sphere. In the decision under consideration, there is no question of anyone being discriminated against because of race, nor is it conceivable that the decision could be considered as one which would encourage racial discrimination. On the contrary, the Georgia courts expressly recognized that Bacon's property cannot be used as a park on a racially discriminatory basis.

In summary, it is the position of respondents that this case involves the construction of a Georgia will by a Georgia court in accordance with Georgia law, and nothing else, and in no way have any rights guaranteed petitioners by the Federal Constitution been denied.

ARGUMENT

The State Court Decision

Respondents submit that the petition for a writ of certiorari should be denied because the decision of the Supreme Court of Georgia involved nothing more than the application of well-settled principles of Georgia law to a Georgia will. No rights guaranteed petitioners by the Fourteenth Amendment have been denied; nor is the decision of the Georgia court in any way inconsistent with the decision of this court in **Evans v. Newton**, 382 U. S. 296 (1966).

This Court has scrupulously adhered to the rule that the highest court of a state may administer its statutory and common law according to its own understanding and interpretation (see, e. g., **American Railway Express Co. v. Commonwealth of Kentucky**, 273 U. S. 269 (1927)), and especially where the law which is being administered by the state tribunal is property law (see **Tyler v. U. S.**, 281 U. S. 497 (1930)), or where the case involves the construction of a will. As this Court stated in **Lyeth v. Hoey**, 305 U. S. 180, 59 S. Ct. 155 (1938):

“The local law determines the right to make a testamentary disposition . . . and the condition essential to the validity of wills, and **the state courts settle their construction.**” 59 S. Ct. at 158. (Emphasis supplied.)

The Decision of the Georgia Court Does Not “Frustrate This Court’s Mandate in **Evans v. Newton**, 382 U. S. 296 (1966)”

The thrust of this Court’s decision in **Evans v. Newton**, supra, as we understand it, was only that if Baconsfield continued in existence as a park, it would have to be open to members of both races. Contrary to the contention of

petitioners, we do not construe the decision of this Court as including a direction to the Georgia Supreme Court to reappoint the City of Macon as trustee. Instead, it was the duty of the Georgia Supreme Court to consider the entire case (and not just the limited question relating to the resignation of the City as trustee and the appointment of new trustees) in the light of the decision of this Court that Bacon's property could not be used as a park for white persons only.

While it is true that the order appointing new trustees had been reversed, and the "trust" was without a trustee, the controlling consideration was the fact that a common sense construction of Bacon's will in the light of the decision of this Court led the Georgia Supreme Court to the inescapable conclusion that the purpose for which the trust had been created had become impossible of accomplishment; and, consequently, under Georgia law, the trust had terminated. Furthermore, under Georgia law, where a trust fails, and where there is no gift over, a resulting trust is implied for the benefit of the heirs of the testator. Ga. Code, Sec. 108-106 (4). The question, therefore, of whether or not to order the reinstatement of the City of Macon as trustee was obviously moot, for there was no longer a trust.

The Decree of the Court Below Is Not Hostile to the Petitioners' Right to Immunity From Racial Discrimination

A. The Decision of the Georgia Supreme Court Did Not Infringe Upon Any Rights Guaranteed Petitioners by the Fourteenth Amendment; Nor Does It Encourage Racial Discrimination. The Decision Involved Nothing More Than the Construction of a Georgia Will by a Georgia Court in Accordance With Georgia Law.

The "immediate contemporary facts" with which petitioners choose to begin their Fourteenth Amendment ar-

gument are not the "facts" with which the Georgia court was directly concerned. On the contrary, the Georgia court had only two basic "facts" to consider, one being this Court's decision in **Evans v. Newton**, 382 U. S. 296 (1966), and the other, of course, being Bacon's will. The fact that Negroes had used the park in violation of the terms of the trust, and that the City had not taken affirmative action to enforce the racial provisions in the trust, had nothing directly to do with the decision of the Georgia court which is herein complained of. These were matters which had transpired prior to this Court's decision in **Evans v. Newton**, *supra*. The "showing", then, upon which the Georgia court acted was this Court's ruling that Bacon's property could not be used as a park on other than an integrated basis, something which would be contrary to Bacon's express wishes; and the basis of the Georgia decision was a construction of Bacon's will in the light of this ruling, and in the framework of Georgia's laws relative to wills and trusts.

The "federal interest" of petitioners is no more than that if Baconsfield were continued in existence as a park, it would have to be operated on a non-discriminatory basis. This, of course, the Georgia court recognized and accepted. There is no basis for the implication that there was an additional federal requirement that the Georgia court construe Bacon's will in such a manner that would result in Baconsfield continuing as a park, when such construction would not be authorized by Bacon's will, and would be contrary to the laws of Georgia. The construction of Bacon's will was peculiarly a matter which addressed itself to the state court. See, e. g., **Lyeth v. Hoey**, 305 U. S. 180, 59 S. Ct. 155 (1938). And as Mr. Justice Black observed in his dissenting opinion in **Evans v. Newton**:

"So far as I have been able to find, the power of a state to decide such a question (reversion) has been

taken for granted in every prior opinion this Court has ever written touching the subject.” Evans v. Newton, 382 U. S. 296 (1966).

Petitioners’ characterization of the Georgia judgment as being a “penalty” which was imposed upon the City of Macon because of its inability to enforce racial segregation at Baconsfield does not comport with the facts. Petitioners are trying to find impermissible state action where none exists. In so doing, they paint a totally false picture; one which is clearly refuted by the record. Reversion occurred **only** because the trust failed, and the trust failed, not because the City did not undertake to enforce the racial restriction, but because this Court had ruled that an indispensable element of Bacon’s plan for Baconsfield could not be complied with, regardless of who the trustee was. The Georgia Supreme Court did not look to the will to “justify” its judgment. It looked to the will to determine what its judgment had to be.

Accurately speaking, the actual decision of the Georgia court had nothing whatever to do with racial discrimination as such. This issue had been completely eliminated by the decision in **Evans v. Newton**, 382 U. S. 296 (1966). The decision of the Georgia court was based upon a set of **facts** which can, and must, be divorced from any consideration of the merits of Bacon’s social philosophy. The Georgia court had to start with the fundamental proposition that in construing Bacon’s will all parts and provisions of the will had to be considered. See **Yerby v. Chandler**, 194 Ga. 263, 21 S. E. 2d 636 (1942). The wisdom of these provisions was not in issue. Thus, the Georgia court had before it on the one hand Bacon’s clear expression of intention that he wanted a park **only** for “white women, white children . . .”, and that he was unequivocally opposed to the two races using recreation grounds “together and in common”. On the other hand, this court had ruled that Bacon’s property could not be used

as a park unless it was open to members of both races. Certainly, it cannot be denied that for the property to be used as a park open to members of both races would be directly contrary to the clearly expressed intention of Bacon. That was a fact which the Georgia Court had to accept. As a matter of Georgia law, property devised in trust for a charitable use cannot be diverted from that use to one not intended or authorized by the testator, and *a fortiori*, it cannot be devoted to a use of which the testator has expressly stated he disapproves. Therefore, accepting the foregoing as facts which the Georgia court could not blithely ignore (even if perhaps the members of the court might personally have disagreed with Bacon's social philosophy), the court had no alternative but to recognize that as a matter of Georgia law the trust had failed.⁴ We say, without hesitation, that race had nothing to do with the decision of the Georgia Court.

We disagree with the assertion that the Georgia decision will be cited for "the proposition that state courts may generally decree reversion of property for breach of a racial condition." Petitioners overlook the fact that this case does not involve property which had been purchased subject to a racial condition. This was Bacon's property and it is fundamental that a person who creates a charitable trust can make the use of his property subject to conditions.⁵ That is not to say that a testator

⁴ For the Georgia Court to have failed to recognize that the trust had failed would have resulted in a deprivation of respondents' property without due process of law. See **Charlotte Park & Recreation Commission v. Barringer**, 252 N. E. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 (1956).

⁵ As Justice Harlan noted in his concurring opinion in **Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church**: "I do not, however read the Court's opinion to go further to hold that the Fourteenth Amendment forbids civilian courts from enforcing a deed or will which expressly and clearly lays down conditions limiting

could require that his property be used in a manner contrary to law, but it does mean that under no circumstances could the property be used in a manner violative of the express conditions imposed upon the use of the testator's property. It is one thing for a court to say, in effect, that as a matter of public policy we are not going to let a testator's property be used in the manner he would like it to be, and indeed, quite another to go further and say that since the property cannot be used in the prescribed manner, it will be put to another use even though the testator specifically stated that he disapproved of such use.

Contrary to the contention of petitioners (Petition, pp. 33 and 36), the decision of the Georgia court is not at all inconsonant with **Reitman v. Mulkey**, 387 U. S. 369 (1967) (or with any other decision of this court). In **Reitman**, *supra*, it was found that the state had involved itself in private racial discrimination to an unconstitutional degree. There, and in the other cases cited at page 33 of the petition which relate to racial discrimination, the courts were concerned with state involvement in actual racial discrimination, both present and prospective. In the decision under consideration, there is no question of anyone being discriminated against because of race; and, certainly there is nothing which would remotely suggest that the state has encouraged, or been in any way involved with constitutionally impermissible racial discrimination. It was Bacon, not the State of Georgia, who decreed that his property would not be used as an integrated park, and no one has any **right**, federal or otherwise, to require that the property be used in a manner contrary to the re-

a religious organization's use of the property which is granted. If, for example, the donor expressly gives his Church some money on the condition that the Church never ordain a woman as a minister or elder . . . , or never amend certain specified articles of the Confession of Faith, he is entitled to the money back if the condition is not fulfilled." 37 Law Week 4107, 4110 (January 27, 1969).

strictions placed upon the use of the property by Bacon. And, of course, with the removal of the property from the "public" to the private sphere any possible question of state action which would violate the Fourteenth Amendment has been eliminated. It is indeed difficult to conceive how the Georgia decision, which expressly recognized that Bacon's property could not continue to be used as a segregated park, could in any way "encourage racial discrimination."

Although the construction of wills is peculiarly a matter for the application of state law by state courts, petitioners urge upon this Court the contention that the Georgia court incorrectly construed Bacon's will. Looking at the will in even a cursory manner, one cannot help but be impressed by the fact that Bacon planned for his park with the greatest of care and deliberation. This park, which was to be a memorial to Bacon's two sons, was by no means to be just another "city park." Instead, Bacon's park was to be subject to conditions not applicable to other parks; and the operation and management of the park were vested in a Board of Managers which was to (and did) function entirely independent of the City and its governing body.

As for the racial restriction, we can hardly imagine Bacon having used language which would have more clearly indicated his intent that the use of his property should be extended to white persons only, or which would have more clearly indicated that this limitation was an essential and indispensable part of his plan for Baconsfield. Indicative of Bacon's careful planning in this regard is the fact that not only was he careful to limit Baconsfield to white persons, but also he provided that the white men of Macon, and white persons from other communities, would be admitted only at the pleasure of the Board of Managers. Furthermore, he authorized the Board to "exclude at any time any person or persons of either sex, who may be deemed objectionable."

Insofar as this litigation is concerned, obviously, the most significant passage in Bacon's will is that which explains why he so carefully limited the use of Baconsfield to the "white women, white girls, white boys, and white children of the City of Macon." The racial limitation was not included because of any feeling of hostility toward colored people, nor was it prompted by a desire to be charitable only to persons of his own race, or because Bacon felt that the presence of Negroes would "spoil" the park for white persons. Instead, it was that as a matter of personal social philosophy, Bacon was:

" . . . without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common" (R. 18).

Petitioners have suggested several reasons why they think the Georgia court erred in its construction of Bacon's will, none of which, we submit, has any merit.

First, they argue that neither Bacon nor any other person "has any lawful power" to exclude Negroes from Baconsfield park. As has been pointed out, there is no dispute about the fact that Bacon's property cannot now be used for a park operated on a segregated basis. However, at the time Bacon's will was probated, and up until this Court's decision in 1966, there was no constitutional prohibition against the operation of Baconsfield in a manner consistent with the requirements set forth in Bacon's will. The fact that some 50 years after the probate of Bacon's will it was decided by the United States Supreme Court that the park which Bacon created cannot continue to be operated for white persons only did not give the Georgia court, or any court, the right to rewrite Bacon's will and to delete those restrictions relative to the use of the park by white persons. There is clearly a difference

between a court determining that a trust cannot continue to be operated in accordance with the testator's intent because such operation would be contrary to law, and a holding that because of this, the "illegal" words will simply be disregarded. In such a situation as existed in this case, a court would in any event have to construe the will under consideration in light of the failure of the trust, and would have to determine whether or not *cy pres* could be applied, and if it could not, then the property would revert by operation of law. In no event could the testator's intention simply be disregarded or ignored.

The second consideration advanced by petitioners relates to the fact that Bacon did not expressly provide for reverter upon failure of the trust. It is probable that Bacon never actually considered that his trust would fail, for at the time he drafted his will (and up until 1966) his plan for Baconsfield was entirely lawful. The absence of a clause providing for express reversion is of no significance insofar as Georgia law is concerned. As the Georgia Supreme Court pointed out, the property reverted, not under the terms of the will, but because of Ga. Code Sec. 108-106 (4) which provides that upon the failure of an express trust, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.

In not expressly providing for reversion, Bacon was not unlike other testators. As has been noted:

"Indeed, it is ordinarily true that the testator does not contemplate the possible failure of his particular purpose, and all that the court can do is to make a guess not as to what he intended but as to what he would have intended if he had thought about the matter." IV **Scott, Trusts**, Sec. 399.2, at 2832 (2d ed. 1956).

We submit that a fair and reasonable reading of Bacon's will leads to the undeniable conclusion that under no cir-

cumstances could Bacon's property ever be used as an integrated park. While Bacon may not have specifically contemplated a trust failure, he did expressly state that he was "without hesitation in the opinion that in their social relations the two races should be **forever** separate and . . . they should not have pleasure or recreation grounds to be used or enjoyed together and in common." Bacon's will is certainly not "silent on this point."

Petitioners are in error when they suggest that the Georgia court should have considered what "a Georgian who died over 50 years ago" would prefer (Petition, p. 38). The Georgia court was constrained to consider only what **Bacon** (and no one else) would have wanted had he known that his plan for Baconsfield would someday become impossible of accomplishment; and, in answering this question, the Georgia court could look only to Bacon's will. That is to say, the court could not speculate as to what a hypothetical Georgian might have desired; nor could it engage in speculation as to what use might be made of the property upon reversion. There is no law, state or federal, which would permit a court to "update" a testator's social philosophy. Suffice it to say, the Georgia court was bound by Bacon's intention as manifested in all of the provisions of his will. See **Yerby v. Chandler**, 194 Ga. 263, 21 S. E. 2d 636 (1942).

Petitioners suggest that the activity of the City during the period it was trustee was relevant to the issues before the Georgia court. We disagree. The fact that during the period of years when the park was being operated by the Board of Managers in accordance with Bacon's will, workmen from the City worked at Baconsfield, or that the City had any other contact or connection with the park, had no bearing on the question of whether or not there had been a trust failure, and likewise had no bearing on the question of reversion, or the applicability of the doctrine of

cy pres. It would indeed be a radical introduction into the law of trusts for a court to hold that a trustee (or anyone else) could, in effect, alter the provisions of a testamentary charitable trust by spending money (or doing anything else) in connection with the trust property. Certainly, a trustee could never acquire title to the trust property in the absence of action on the part of the person who established the trust. This is true no matter how much money the trustee might spend on the trust property. In essence, the Georgia court was concerned solely with the question of whether or not the trust had failed and (upon recognizing that it had) whether or not *cy pres* should be applied. What might have happened between the time the trust became operative and the date of termination was of no relevance.

The case illustrative of the fact that the expenditure of funds by a municipality in connection with trust property would not prevent reversion is **Charlotte Park & Recreation Commission v. Barringer**, 252 N. E. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 (1956). In that case it was stated:

“If Negroes use the Bonnie Brae Golf Course, the determinable fee . . . automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer.” 88 S. E. 2d at 123.

Also, see 39 Am. Jur., Parks, Squares and Playgrounds, Sec. 21, where it is stated that where land is dedicated to a municipality as a park, it “must be preserved or the land will revert to the original proprietor.”

While we do not view the activity of the City as having any bearing on the issues which were before the Georgia court, as a matter of interest, we would point out that there is nothing at all inequitable about the fact of

reversion, as during the period of time the City was trustee, a large segment of the community was entitled to use Baconsfield. The situation is not at all unlike that where a municipality leases property to be used as a park. Certainly, no one would suggest that the City could acquire any greater rights in the land than provided for in the contract with the owner.

B. The Decision of the Georgia Court Rests Solely Upon a Construction of Bacon's Will, and in No Way Rests Upon Any Proposition That the Presence of Negroes Would Affect the Enjoyment of a Park by White Persons.

The contention that the Georgia Supreme Court based its decision upon the ground that the presence of Negroes "spoils" a park for whites is totally without merit, or justification. The Georgia court was not in the least concerned with any factual consideration of whether or not the presence of Negroes might "frustrate" the enjoyment of a park by whites, nor was the court concerned with the question of whether or not the property was large enough to accommodate both the whites and Negroes of the community. Simply stated, petitioners miss the point when they talk solely in terms of "enjoyment". Whether or not white persons in the community might actually "enjoy" using Baconsfield in conjunction with Negroes, was **not** the question. Instead, the court's only concern was whether such use would violate Bacon's restriction that his property be used by white persons only. Clearly it would, for Bacon's concern was not that Negroes might adversely affect the enjoyment of the park by white persons, but rather it was that he was opposed to the mixing of the races in social relations. Stated differently, Bacon viewed an integrated park as being affirmatively objectionable, and regardless of the fact that many white persons might not object to using such a park, Bacon did not want his property so used.

Petitioners speak in terms of the "affirmative purpose of the trust" (Petition, p. 41), as if to imply that the Georgia court would have been justified in disregarding the racial restriction on the ground that such restriction was "negative". The Georgia court, of course, had to construe the will as a whole and to give consideration to all of its parts, including those which qualified the use of the property. Under a proper construction of Bacon's will, Bacon had only one intent, one purpose, to-wit, to create a park . . . "for the **sole** . . . use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon. . . ." His plan for a park for these persons was a comprehensive, cohesive, interlocking one which may not be divided into sections or parts.

In Bacon's mind, a park which would be used by both races was significantly different from a park which would be used only by members of one race, in that a park of the former type would be contrary to his personal social philosophy. While Bacon wanted to furnish a park for white persons in the community, his charitable intention was obviously conditioned upon the park being used by white only. Otherwise, his property would be put to a use which he considered wrong, to-wit, a recreation ground used jointly by members of both races.

Petitioners suggest that the Georgia court could have reached the result which petitioners deem to be socially desirable by applying the doctrine of *cy pres*. *Cy pres*, however, is not applied as a matter of course in every instance of charitable trust failure. It is an intent-enforcing doctrine and whether or not it can, or should, be applied depends upon a construction of the particular will under consideration. *Cy pres* can be applied "only for the purpose of carrying out what would probably have been in accordance with the intention of the testator."

IV **Scott, Trusts**, Sec. 399.1, at 2831 (2d ed. 1956). It can never be applied where the result would be contrary to the express desire of the testator. *Ibid.*

For a Georgia court (and surely this was a matter for the state court to decide) to have applied *cy pres* in the manner sought by petitioners, would have resulted in Bacon's property being put to a use of which he very clearly and expressly disapproved, and to apply *cy pres* in this manner would be contrary to Georgia law.

Actually, the result desired by petitioners (under any of their theories) could be obtained only by returning to our jurisprudence the rightfully rejected doctrine of the royal perogative. This doctrine, which was a part of the early English common law, permitted the sovereign in a situation such as this to apply property for any charitable purpose he might deem appropriate. According to Scott:

“The exercise of the perogative power by a biased or cynical or whimsical king sometimes resulted in devoting the property of the testator to purposes of which he never would have approved, purposes which might run entirely counter to his wishes. . . .” IV **Scott, Trusts**, Sec. 399.1, at 2829 (2d ed. 1956).

This doctrine is not accepted in any of the states, and certainly not in Georgia. In **Jones v. Habersham**, 107 U. S. 174, it was stated, “. . . the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal perogative is exercised . . .”

Scholars who wish to point out the obvious evils of the doctrine of the royal perogative cite as a classic case of injustice, **DeCosta v. DePas**, 1 Amb. 228, 2 Swanst 487 (1754). In that case, a Jewish testator had left money in trust to establish an assembly for reading Jewish law and instructing people in the Jewish religion. This was deemed to be illegal as promoting a religion contrary to the estab-

lished religion of the state. The king thereupon diverted the trust fund so that it would be used to instruct persons in the Christian religion.

Bacon's great emphasis on his racial limitation and his express disapproval of recreational areas which would be used by members of both races together and in common show that a "desegregated" park would indeed be as contrary to his wishes as the final disposition in **DeCosta v. DePas**, supra, would have been to the testator in that case.

Petitioners charge that the Georgia court "necessarily decided that the racial limitation in Senator Bacon's will was of more dignity and importance than his equally or more solemn and explicit provisions for the perpetuity of this trust" (Petition, p. 47). This is wrong. The racial limitation in the will was entitled to, and given, no more "dignity" than any other provision of Bacon's will; but it **was** entitled to consideration in its proper perspective, and this is something petitioners refuse to recognize. Giving the provisions relative to the racial restriction their common sense meaning, and construing the will as a whole, it can hardly be denied that *cy pres* could never be applied in such a manner that would result in Bacon's property being used as an integrated park. If there was any "policy decision" made by the Georgia court, it was only that the end does not justify the means, and thus *cy pres* was not used as an unauthorized means to rationalize a result not authorized by Bacon's will or Georgia law.

Petitioners do a serious injustice to the members of the Georgia Supreme Court when they charge that the judgment of that court "implies espousal . . . of an estimate that racial mixture is crucially undesirable" (Petition, p. 48). There is nothing in the record which would justify

anyone concluding that the members of the Georgia court shared Bacon's feelings on race. The merits (or demerits) of Bacon's philosophy were not in issue. The Georgia court had to accept what it found, and regardless of the personal opinions of the individual members of the Georgia court, the racial limitation which Bacon placed upon the use of his property could not be ignored.

In summary, whether or not the presence of Negroes spoils a park for whites was not in issue. Rather, the controlling consideration was Bacon's will and, notwithstanding the fact that whites might enjoy using a park in conjunction with Negroes, it is clear that an integrated park would be directly contrary to Bacon's intentions as expressed in his will.

C. The Racial Restrictions in Bacon's Will Could Not, Under Any Theory, Have Been Treated by the Georgia Court, or Any Other Court, as "Nullities". The Georgia Court, in Construing Bacon's Will, Had to Consider These Provisions Along With All Other Provisions of the Will.

Petitioners are indeed urging a radical departure from fundamental concepts of will-construction when they talk about treating any provision of a will as being a mere "nullity" which can be disregarded, as if it did not appear in the will. They are, in effect, saying that the Georgia court should have "rewritten" Bacon's will so that what they would consider to be a socially desirable result would have been obtained. This is simply not the law. As has been discussed, if a charitable trust fails because an indispensable provision thereof is deemed to be unenforceable, the result is not an *ipso facto* elimination of that provision from the will, but instead it then becomes the duty of the court to decide whether under the circumstances then existing *cy pres* should, or should not, be applied.

Petitioners offer as their first reason why Bacon's will should be accorded such unusual treatment the novel proposition that the provisions of Bacon's will relative to Baconsfield Park "became tantamount to City ordinances" (Petition, p. 50). Petitioners cite no authority in support of this unusual proposition, and, of course, there is none. A will does not lose its identity or status as a will simply because a municipality is named as the trustee of a testamentary trust.

Ordinances are commonly understood to be enactments of the legislative body of a municipal corporation. If a court accepted the proposition that the provisions of a will could somehow be considered to become city ordinances, then it would logically follow that the governing body of the city would have the power to alter the provisions of the will in the same manner they could amend "other city ordinances." We can hardly imagine a more fundamental (or more unacceptable) departure from the law of wills.

The "factual" reasons which petitioners cite in support of their argument that Bacon's will should be treated as a city ordinance are without merit. There is certainly no basis for the statement that the provisions of Bacon's will were "promulgated and espoused by the City with respect to the conduct of its parks" (Petition, p. 50). First, of course, it was Bacon, and not the City of Macon, who promulgated these provisions and, second, the provisions of Bacon's will had nothing whatever to do with the conduct of the City of Macon's parks. They affected only Baconsfield, and the management of Bacon's park was vested, not in the City, but in the Board of Managers whose sole responsibility was the management of the park in accordance with Bacon's will.

The contention that Bacon intended for the provisions of his will to "achieve very quickly the status of City

Ordinances” (Petition, p. 51) is not only without foundation, it is pure fantasy. There is not the slightest indication in the will that Bacon had any such intention. Furthermore, had Bacon intended to involve the City to such an extent (and under Georgia law, we know of no way for him to have elevated his will to the status of a City Ordinance) it hardly seems likely that he would have provided for the park to be managed by the Board of Managers rather than by the City.

Petitioners also argue that Bacon’s will “rested” upon Georgia Code Section 69-504, and since this statute has always been unconstitutional (so petitioners erroneously contend) those provisions of Bacon’s will which provide for the racial restriction should simply be stricken. Assuming arguendo that 69-504 was in fact unconstitutional, its provisions could be (to use petitioners’ word) “stricken” only because the statute was promulgated by the state legislature, and the 14th Amendment forbids State sponsored racial discrimination. Bacon’s will, of course, was solely the product of Bacon, a private citizen, and no matter how discriminatory the provisions of his will might be, they cannot be treated in the same manner as a state statute, for the 14th Amendment does not reach private discrimination. While Bacon’s plan can no longer be carried out, there is no law, state or Federal, which would authorize any court to “strike out” any part of the will, leaving those portions pleasing to petitioners to stand.

The Georgia Supreme Court considered the contention that Georgia Code Section 69-504 was unconstitutional, even at the time it was enacted, and correctly concluded that for it to “hold that the trust provision of Senator Bacon’s will was made pursuant to an unconstitutional Code Section, would have the effect of making the trust impossible of performance (**Smith v. DuBose**, 78 Georgia 413, 434), and thus cause a reversion under Code Section

108-106 (4)" (Opinion of Georgia Supreme Court, Appendix to Petition, p. 22a).

We agree with the Georgia Supreme Court that whether or not Section 69-504 was, or was not, constitutional at the time of its enactment has no bearing on the issues in this case for the same result obtains in either event. Nevertheless, we would note in passing, and in defense of Section 69-504, that this statute was in fact constitutional "even under **Plessy v. Ferguson**." Section 69-504 has absolutely nothing whatever to do with a city's park system and whether or not a system provided for "separate but equal" parks would obviously depend upon an examination of the particular park system under consideration. Furthermore, neither the State of Georgia nor the City of Macon has ever had a statute or ordinance requiring racial segregation in parks; therefore, the "separate but equal" doctrine could hardly be in issue.

It also should be noted that while Section 69-504 authorized a testator to provide for a park that would be racially segregated, it did not require that such a park necessarily be segregated (**Evans v. Newton**, 220 Ga. 280, 138 S. E. 2d 573 (1964); nor was there any reason under Georgia Law why Bacon's provision for a racially segregated park would have been entirely valid even in the absence of Section 69-504. See **Strother v. Kennedy**, 218 Ga. 180, 127 S. E. 2d 19 (1962) and **Houston v. Hills Memorial Home**, 202 Georgia 540, 43 S. E. 2d 680 (1947).

The "philosophy" of **Marsh v. Alabama**, 326 U. S. 501 (1946), has no application to the case under consideration. The situation in the case at hand differs markedly from that which existed in **Marsh v. Alabama**, *supra*. The fundamental difference (and the only one necessary to comment upon) is that, with the failure of the trust, Bacon's property has been completely removed from the "public sphere"; and, therefore, there can be no question of anyone being denied any constitutional rights.

While **Marsh v. Alabama**, *supra*, might have been of possible relevance to the question of whether Bacon's property could continue to be used as a segregated park, it is of no significance whatever insofar as the state law question of trust failure is concerned.

Nor can petitioners find support in either **Commonwealth of Pennsylvania v. Brown**, 392 F. 2d 120 (3rd Cir. 1968), cert. den. 391 U. S. 921 (1968) or **Sweet Briar Institute v. Button**, 280 F. Supp. 312 (W. D. Va. 1967) rev'd per curiam, 387 U. S. 423, decision on the merits, 280 F. Supp. 312 (1967), for in neither of these cases was trust failure (and reversion) in issue. The decision of the Georgia Court is completely consistent with these decisions, for it was expressly recognized that the racial restriction could not be enforced.

We do not share petitioners surprise that the Georgia Supreme Court did not deem it necessary to discuss petitioners contentions with respect to dedication (Petition, p. 55). That there had been no dedication to the public was so obvious as not to require elaboration. The very words of the will clearly negate any intention on Bacon's part to "dedicate" his property to the use of the general public. On the contrary, Bacon was specific in limiting the use of his property to a particular segment of the community.

Dedication is by definition a matter of property law, and whether or not a tract of Georgia property has been dedicated to the general public is very fundamentally a consideration controlled by Georgia law. The federal law command, as expressed in this Court's decision in **Evans v. Newton**, 382 U. S. 296 (1966), is only that if Bacon's property were to be continued to be used for a park, it would have to open to members of both races. This, we submit, has nothing whatever to do with the state law question of whether or not, when Bacon executed his

will, he "dedicated" his property to the use of the general public.

In summary, under no theory could any provision of Bacon's will have been treated as a nullity for it was the obligation of the Georgia court to construe the will as a whole, and to consider all parts and provisions thereof, including those provisions which limited the use of the property.

CONCLUSIONS.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1968

No. ~~60~~ **60**

REVEREND E. S. EVANS, *et al.*,

Petitioners,

v.

GUYTON G. ABNEY, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONERS

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IN THE
Supreme Court of the United States
October Term, 1968
No. 1106

REVEREND E. S. EVANS, *et al.*,

Petitioners,

v.

GUYTON G. ABNEY, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONERS

Opinions Below

The letter opinion of the Judge of the Superior Court of Bibb County dated December 1, 1967, and filed May 14, 1968 (A. 525)* is unreported. The opinion of the Supreme Court of Georgia filed December 5, 1968, is reported at 165 S.E.2d 160 (A. 537). Earlier proceedings in this same case are reported *sub nom. Evans v. Newton*, 220 Ga. 280, 138 S.E.2d 573 (1964), reversed 382 U.S. 296 (1966), on remand, 221 Ga. 870, 148 S.E.2d 329 (1966).

* Citations herein are to Appendix (A.), except where indicated as citations to original record (R.).

Jurisdiction

The judgment of the Supreme Court of the State of Georgia was entered on December 5, 1968 (A. 546). The Petition for Certiorari was filed March 2, 1969 and was granted May 5, 1969 (A. 548). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), the petitioners having claimed the violation of their rights under the Constitution of the United States.

Questions Presented

1. Whether, in the absence of any reversionary clause in the will leaving property in trust as a park, the imposition by the Georgia court of a reversion to the heirs on a showing that Negroes have used, and must be allowed to use the park, constitutes an infringement by state power on a federal interest declared and created by the Constitution, both by its immediate penalization of compliance with the Fourteenth Amendment, and by its operation to discourage desegregation.
2. Whether the holdings by the state court that this trust has "failed" and that *cy pres* cannot apply, rest on a ground impermissible under the Fourteenth Amendment—the ground that the presence of Negroes frustrates the enjoyment of the park by whites, even though the latter, the intended beneficiaries, may use the park as freely as ever.
3. Whether the racially exclusionary provision in Bacon's will must as a matter of federal law be treated as null and void, first, because it is "incurably tainted" for all purposes by its connection with Georgia Code §69-504; secondly, because it was meant to form and did actually form a part of the public law by which the City conducted its

park; and thirdly, because federal law, commanding equality between the races, commanded and by operation of law brought it about that this park, "dedicated in perpetuity" to whites, must also be taken to be "dedicated in perpetuity" to Negroes.

Statutes Involved

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves the following Georgia statutes:

a. Georgia Code Section 69-504:

Ga. Code §69-504 (1933) (Acts, 1905, p. 117):

Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

b. Georgia Code Section 69-505:

Ga. Code §69-505 (1933) (Acts, 1905, pp. 117, 118):

Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used (sic) and enjoyment thereof.

c. Georgia Code Section 108-202:

Cy pres.—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.

d. Georgia Code Section 113-815:

Charitable devise or bequest. Cy pres doctrine, application of.—A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

Statement of the Case

Petitioners are Negro citizens in Macon, Georgia who have sought in this extended litigation to desegregate Baconsfield Park, a previously all-white municipal park left to the City of Macon by the will of the late United States Senator Augustus Octavius Bacon. The case was reviewed by this Court once before in *Evans v. Newton*, 382 U.S. 296 (1966). Petitioners now seek a reversal of a ruling by the Georgia courts that as a consequence of this Court's holding that the Fourteenth Amendment forbids the exclusion of Negro citizens from the park, Bacon's trust fails and the park and other trust property is forfeited by the City and reverts to the heirs of Senator Bacon.

The early course of the lawsuit, which was begun in the Superior Court of Bibb County, Georgia on May 8, 1963, is briefly summarized in the following excerpt from the opinion by Mr. Justice Douglas for the Court, *Evans v. Newton*, 382 U.S. 296, 297-298:

In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that "in their social relations the two races (white and negro) should be forever separate." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.

Thereupon, individual members of the Board of Managers of the Park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Thereafter the city resigned as trustee and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and bequeath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. 220 Ga. 280, 138 S. E. 2d 573.

This Court, in reversing the judgment of the Georgia Supreme Court, ruled that the park was "a public institution subject to the command of the Fourteenth Amendment,

regardless of who now has title under state law" (382 U.S. at 302).

Immediately after this Court's decision, the Supreme Court of Georgia delivered a second opinion setting forth the view that the purpose for which the Baconsfield Trust was created had become impossible to accomplish and had terminated. *Evans v. Newton*, 221 Ga. 870, 148 S.E.2d 329 (1966). However, the judgment did not direct that the Superior Court on remand enter any particular order, but merely ruled that the court should pass on contentions of the parties not previously decided, and said that the "judgment of the Supreme Court of the United States is made the judgment of this Court" (148 S.E.2d at 331).

On remand in the Superior Court of Bibb County, a Motion for Summary Judgment (A. 98) (which was subsequently amended and supplemented by three additional pleadings (A. 360, 462, 468) was filed by Guyton G. Abney, et al. as Successor Trustees under the Last Will and Testament of Senator Augustus Octavius Bacon. The motion asked that the court rule that Senator Bacon's trust had become unenforceable, and that the Baconsfield property had reverted to movants as successor trustees under Item 6th of Bacon's will, and to certain named heirs of Senator Bacon (A. 103). The motion was opposed by petitioners, Rev. E. S. Evans, et al., the Negro citizens of Macon who had earlier intervened seeking the racially nondiscriminatory operation of Baconsfield Park, by the filing of a response (A. 119) and four supplemental responses to the summary judgment motion (A. 242, 393, 454; R. 971). Petitioners filed numerous exhibits, as well as depositions, affidavits, answers to interrogatories and stipulations setting forth additional facts. Petitioners objected on federal constitutional grounds based on the due process and equal protection clauses of the Fourteenth Amendment, as well

as on state law grounds, to the relief sought by the successor trustees and heirs. The heirs also filed several affidavits and exhibits supplementing the factual record. None of the other parties to the case, including the City of Macon, the Trustees of Baconsfield named by the court's order of March 10, 1964, or the members of the Board of Managers of Baconsfield (who initiated this lawsuit) either opposed the granting of the relief requested in the Motion for Summary Judgment, or offered any evidence. The court heard oral arguments on June 29, 1967, and granted the parties time to file further documentary evidence, which was filed.

At the hearing the petitioners, Evans, et al., suggested that the Attorney General of Georgia should be made a party to the case. By order dated July 21, 1967, the Attorney General was made a party pursuant to Georgia Code Section 108-212 (Acts 1952, pp. 121, 122; 1962, p. 527). The Attorney General of Georgia filed a "Response" opposing the relief requested by the heirs and supporting the position of the intervenors E. S. Evans, et al. that the doctrine of *cy pres* should be applied to save the trust (R. 975-988).

The Superior Court, granted the relief requested in the successor trustees' and heirs' Motion for Summary Judgment, ruling that the trust established by Senator Bacon failed immediately upon this Court's ruling in January 1966, that the City of Macon was dismissed from the case, and that the trust assets reverted to the successor trustees and heirs (A. 517-524). In addition, the court ruled that the doctrine of *cy pres* was not applicable, that there was no dedication to the public, that the heirs were not estopped and that no federal constitutional rights of intervenors were violated by the reversion of the trust assets (*id.*). The Superior Court order and decree was entered May 14, 1968 (*id.*).

Petitioners duly appealed to the Supreme Court of Georgia, which filed an opinion December 5, 1968, affirming the decree of the Bibb Superior Court, and rejected petitioners' federal constitutional claims (A. 537-545). The court below stayed its remittitur and further proceedings pending the disposition of a timely petition for certiorari in this Court (A. 547).

While the record filed with this case includes the entire record of proceedings before this Court on the prior petition, it also includes a good deal of additional factual data and evidence presented to the Superior Court on remand. The evidence develops the history of Baconsfield Park, and shows in great detail the substantial governmental investment, including the expenditure of both city and federal government funds, in establishing, improving and maintaining Baconsfield Park.

The Will

Senator A. O. Bacon provided in Item 9th of his Will (A. 10-31), signed in 1911 and probated in 1914, for the disposition of his farm called Baconsfield. He left the property in trust for the use of his wife and daughters during their lives (A. 118) and provided that after their deaths:

... it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and

enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for: the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. (A. 19)

The will provided for a seven member all-white Board of Managers to be chosen by the Mayor and Council of Macon (A. 19) and for the Board to have power to regulate the park, including discretion to admit men (A. 20). Senator Bacon directed that a portion of the property be used to gain income for the upkeep of the park (A. 20). He directed that "in no event and under no circumstances" should either the park property or the income-producing area be sold or otherwise alienated, and specified that except for the designated income-producing area the property "shall forever, and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified" (A. 20). The will stated Senator Bacon's belief that Negroes and whites should have separate recreation grounds (A. 21). It also stated his wish that the property be "preserved forever for the uses and purposes" indicated in the will, and that it be perpetually known as "Baconsfield" (A. 21). It provided that the trustees had no power to sell or dispose of the property "under any circumstances and upon any account whatsoever, and all such power to make such sale or alienation is hereby expressly denied to them, and to all others" (A. 22).

Item 10th of Senator Bacon's will bequeathed bonds, valued at \$10,000, to the City of Macon with directions that the income be used for the preservation, maintenance and

improvement of Baconsfield (A. 22). The will said that if the City was without legal power under the city charter to hold the funds in trust, the City should select a successor trustee (A. 24). Bacon gave a similar direction for the City to select a successor trustee "if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their charter to hold in trust for the purposes specified the property designated for said park and pleasure ground . . ." (A. 24).

In a 1913 codicil, Senator Bacon noted that one of his daughters, Mrs. Augusta Curry, had predeceased him, and provided that her children should stand in her place in the disposition of the property, except that with respect to Baconsfield their interest would cease upon the death of his wife and his other daughter (A. 29-30). Item 3rd of the codicil provided, *inter alia*:

To prevent possibility of misconstruction I hereby prescribe and declare that all interest of the said children of my said daughter Augusta in the property specified in Item 9 of my said Will and in the rents, issues and profits thereof, shall cease, end and determine upon the death of my wife Virginia Lamar Bacon and of my daughter Mary Louise Bacon Sparks (A. 30).

In Item 4th of the codicil, it was provided that Custis Nottingham, one of the trustees and executors under the will, and his family, could occupy a house on Baconsfield rent-free until the full expiration of the trust for which he was appointed (A. 30).

The City of Macon Acquires Baconsfield—1920

The City of Macon obtained possession of Baconsfield in February 1920, many years before the death of Senator Bacon's surviving daughter, by virtue of an agreement

between the City and the trustees under the will, which was entered into with the written assent of all of Senator Bacon's heirs. The agreement is set forth in the Macon City Council Minutes of February 3, 1920 (Intervenors' Exhibit O; A. 405-407). Under the agreement between the City and the trustees, which recites that it was executed with the signed assent of all legatees and beneficiaries of the Bacon estate, the trustees conveyed Baconsfield to the City by deed, and also conveyed to the City to be covered into the City treasury the bonds and accumulated interest bequeathed by Item 10th of the will (*Id.*). The deed of Baconsfield to the City appears in the record as Intervenors' Exhibit F; it was executed February 4, 1920, and recorded February 10, 1920 (A. 353). In the agreement the City agreed to pay the trustees the sum of \$1,665 annually during the life of Senator Bacon's daughter, Mrs. Sparks (A. 405-407). The City also agreed that it would appropriate 5% of the sum of the value of the bonds and accumulated interest each year, or \$650 annually, for the improvement of Baconsfield Park (*Id.*). The City agreed not to charge any taxes or other assessments of any kind against the property (*Id.*). At the same time the City agreed with Custis Nottingham that he would terminate his occupancy of a house in Baconsfield in consideration of a cash payment of \$5,100 from the City of Macon (Exhibit O; A. 405). Nottingham's Quit Claim Deed to the City is Intervenors' Exhibit G (A. 357).

The City of Macon paid \$5,100 to Custis Nottingham in consideration of his deed of his interest in Baconsfield (A. 405). The City of Macon paid the trustees under the will an annuity each year during the life of Mrs. Mary Louise Bacon Sparks. The Baconsfield annuity payments of \$1,665 per year were regularly included in the Macon City budgets. (See, for example, budgets for the years 1939 and

1940, Intervenors' Exhibits T and U; A. 416, 417). Mrs. Sparks lived until May 31, 1944 (Intervenors' Exhibit W; A. 456). Accordingly, there were 25 payments of \$1,665 from February 1920 through February 1944, and the City of Macon thus paid a total of \$41,625 to the trustees under Bacon's will in order to acquire Baconsfield during Mrs. Sparks' life.

The Macon City Council Minutes of February 17, 1920 (Intervenors' Exhibit P; A. 408), reflect the fact that the City had taken over Baconsfield Park; that the council elected the first Board of Managers; that the Mayor of Macon, G. Glenn Toole, was elected to the Board of Managers; and that this election of the Mayor was requested by the trustees under Bacon's will, Messrs. Jordan and Nottingham, who wrote a letter to the Mayor stating:

In turning over to the City of Macon the park devised to it by Senator Bacon, permit us to express the hope that this Park will mean all to the white citizens of Macon that Senator Bacon wished it to mean.

The place is one of great natural beauty, but it could easily be marred by haphazard work. We are sure that before anything material is done to this property that you, the City Council, and the Commission appointed by it will have a well defined and permanent plan of improvement in view.

We believe that it is of the utmost importance that you be a member of this Commision, and wish here to voice the hope that you will not decline such service from any false modesty. *It will greatly expedite the people's enjoyment of this property if the Commission is headed by the head of our City Government.* Differences in opinion and change of plans will be thus avoided, and the money essential to the improvement of this property will be expended by the one charged with raising it. (A. 408-409; emphasis added).

Mr. Toole who was Mayor of Macon from 1918-1921 and from 1929-1933 (Heirs and Trustees Exhibit E; A. 463), remained a member of the Board of Managers until 1945. (Intervenors' Exhibit B, Baconsfield Minutes of May 30, 1945, and November 1, 1945; A. 268, 271, 273-274).

***City Administration and Financial Aid to the Park
and Federal Government Aid***

Mr. T. Cleveland James was Superintendent of Parks of the City of Macon from 1915 to the time of his Deposition in April 1967 (A. 206). He developed most of Macon's parks, including Baconsfield and exercised "general supervision" over Baconsfield for many years. (A. 205). He testified that Baconsfield was a "wilderness" with "undergrowth everywhere" and no facilities at the time the Mayor directed him to take charge of the park (A. 199-200; 202; 218). Supt. James initially developed Baconsfield Park using workmen who were paid by the federal Works Progress Administration, an agency of the United States (A. 203-205). The W.P.A. men were working at Baconsfield under his supervision for a period he estimated as a year or more (A. 203-205; 218). The federally paid workmen cleared the underbrush, cleared foot paths, built footbridges, dug ponds, built benches, planted trees and flowers and generally performed landscaping work in Baconsfield Park (A. 201-207). The W.P.A. workers did similar work in other city parks under the supervision of the City Park Superintendent (A. 213). Mr. James' testimony is supplemented and corroborated by W.P.A. records from the archives of the United States (Intervenors' Exhibit E; excerpts at A. 347-352) which reflect that Works Progress Administration Work Project No. 244 involved landscaping city parks in Macon, Georgia under the supervision of the City Park Superintendent. The W.P.A. records indicate that W.P.A. Project No. 244 was ap-

proved August 7, 1935; that the federal government paid \$120,032.35 for 469,079 man hours of work; and that the sponsor (City of Macon) paid \$17,923.43 for work on the project (A. 349). The W.P.A. records do not indicate how much of the labor was at Baconsfield and how much was at other city parks. But, Mr. James' testimony indicates that W.P.A. work at Baconsfield was very extensive (A. 218):

Q. Will you describe for us very briefly what you meant when you said Baconsfield Park was a wilderness when you first went out there? A. Well, there wasn't nothing there but just undergrowth everywhere, one road through there and that's all, one paved road.

Q. And no facilities out there; is that correct? A. No.

Q. And how long did it take you to turn it into a usable park? A. Oh, about 6 or 8 months, probably a year.

Q. I see, and you used employees fairly regularly during all of that year? A. Yes.

Q. Every day? A. Well, we had the PWA labor, trying to get me to give them something to do, you know, and I worked them over there.

Q. You say you used the PWA employees for maybe a year? A. I expect I did, yes, that is what I did my work with.

The minutes of the Baconsfield Board of Managers meeting held March 30, 1936 (Intervenors' Exhibit B; A. 248), indicate that considerable development, landscaping and planting had been done in the park during the preceding 12 months. No earlier minutes of the Board are available (A. 247). However, the Board minutes indicate an extensive pattern of governmental involvement in the

maintenance of the park from 1936 until the City resigned as trustee of the park in 1964. (The minutes from 1936-1945 are Exhibit B, R. 506-565; see excerpts at A. 246-275. The minutes from 1945-1967 are Exhibit A, R. 376-505; see excerpts at A. 276-346). The City's involvement in the operation of the park was manifested in a great number of ways. For example, for a twelve year period from 1936 to 1948, all but one of twenty-one meetings of the Board of Managers of Baconsfield took place in the Mayor's office or elsewhere in Macon's City Hall. During the same period the Mayor of Macon attended 16 of the 21 meetings. (See, generally, Intervenors' Exhibits A and B *supra*; A. 246-346). The minutes reflect that over an extended period of years the Board of Managers frequently requested and obtained assistance from the City of Macon in developing and improving the park. The minutes of the Board of Managers refer to Baconsfield as "one of the outstanding municipal parks in the Southeast" (A. 294), and to "Baconsfield and the other public parks of the City of Macon" (A. 274).

The deposition of Park Superintendent James and the Board of Managers' minutes indicate positively and conclusively that Baconsfield Park was maintained and operated as an integral part of the City park system from the time the park was first developed until the City resigned as trustee in 1964. Park department employees under Mr. James' supervision maintained Baconsfield just as they did all of the other city parks (A. 200-201; 208; 217-218). Mr. James estimated that the City spent about \$5,000 for flowers and plants in Baconsfield during the years he worked there, and additional amounts were spent by the Board of Managers for gardening supplies (A. 211). In 1938, the United States government gave to the park 144 bamboo plants representing six different varieties of bamboo (A. 252). Mr. James regularly assigned men from the

city Park Department to work in Baconsfield as the need arose (A. 200-201). City workers did all the general maintenance work in the park until 1964 (A. 200-201). For a period of years, Mr. James, the City Superintendent of Parks, lived in Baconsfield Park, occupying a home rent free (A. 290). The substantial value of the city's contribution of labor for upkeep of the park is demonstrated by the increase in the board's maintenance expenditures after the City resigned as trustee of the park in 1964 (A. 235). The amounts spent by the Board of Managers for maintenance in the years 1960-1966 were as follows:

1960 — \$1,307.20
1961 — \$1,645.72
1962 — \$1,995.57
1963 — \$1,465.20
1964 — \$6,545.78
1965 — \$7,073.80
1966 — \$6,675.89

(Computed from Answer to Interrogatory No. 9; A. 135-136.) The Chairman of the Board of Managers agreed that the cost increase in 1964 and thereafter was attributable to the fact that the City withdrew its services, and it became necessary for the board to pay for services which had previously been furnished by the City Parks Department (A. 235). The Mayor of Macon ordered all city employees to stop working at Baconsfield after the City resigned as trustee in 1964 (A. 176-177).

Baconsfield Clubhouse—Built by Federal Government

There is a two story brick building known as the Baconsfield Clubhouse located in the park. The clubhouse was built in 1939 by the Works Progress Administration (W.P.A.), an agency of the United States (Intervenors' Exhibits J (A. 403-404), K (R. 724-841; excerpts at A. 419-442), L

(R. 842-846), M (R. 847-910; excerpts at A. 443-453), N (R. 911-913) and R (A. 413-414)). The clubhouse construction project was sponsored by the City of Macon acting in conjunction with a private group known as the Women's Clubhouse Commission. In its application for federal funds for this project, the City of Macon, by its Mayor and Treasurer, executed numerous documents constituting agreements, assurances, certificates, representations and contracts which are contained within the W.P.A. records (Intervenors' Exhibits K (A. 419-442) and M (A. 443-453)). The City in several documents represented to the United States that the City was the sole owner of the Baconsfield Park property (R. 774, 788-789), *that the City's ownership was "perpetual,"* (A. 449), *that there were no reversionary or revocation clauses in the ownership documents* (R. 789; A. 449), that the property was not private property (*id.*), and certified that proposed clubhouse project was "for the use or benefit of the public" (R. 796, 808; A. 434, 451). Federal funds totaling \$16,512.80 were expended to construct the clubhouse (see Intervenors' Exhibits L (R. 842-846) and N (R. 911-913)). The city officials signed documents indicating that the sponsor's (City's) share of construction costs would be financed out of the "regular tax fund with the assistance of the Women's Club of Macon" (Intervenors' Exhibit K; R. 774). The Women's Club had agreed to contribute \$3,000 (Intervenors' Exhibit R; A. 413). The sponsor's (City's) share of the construction costs finally amounted to \$8,376.91 (R. 846, 913). The total costs of the clubhouse, including the federal contributions (\$16,512.80; R. 845, 912) was \$24,889.71 (Intervenors' Exhibits L and N).

In a sworn certificate executed under oath by the Mayor and Treasurer of the City of Macon on October 14, 1938, quoted in full below, the City promised that there would be

no discrimination against any group or individual in the use of the clubhouse or the property upon which it was located, and *that the City did not intend to lease, sell, donate or otherwise convey title or release jurisdiction* of the property during the useful life of the improvements built with federal funds. The certificate contained in Intervenors' Exhibit K, reads as follows (A. 440-441):

With reference to Works Progress Administration Project Application State Serial No. 6586, this is to certify that the proposed building referred to in plans, specifications and other data submitted to support the project applications, as "Baconsfield Club House" will, upon completion, be used as a community club house for the general use and benefit of the public at large, without discrimination against any individual, group of individuals, association, organization, club or other party or parties who may desire the use of the building and the property upon which the building is located.

It is further certified that the City of Macon, as project sponsor and owner of the property upon which the building is to be constructed, does not intend to lease, sell, donate or otherwise convey title or release jurisdiction of the property together with improvements made thereon, during the useful life of the improvements placed thereon through the aid of W. P. A. funds.

It is further certified that the City of Macon, as project sponsor, will be responsible to see that the property together with the improvements made thereon will be maintained for the general use and benefit of the public, and will not be used for the profit or benefit of any one individual or specific group or organization; and

the management of the property, together with improvements made thereon, will at all times be subject to the approval of the designated city official or officials of the City of Macon, who will be responsible to see that the foregoing certification is adhered to.

/s/ CHARLES L. BOWDEN
Mayor, City of Macon,
Georgia

/s/ FRANK BRANAN
Treasurer, City of Macon,
Georgia

Another similar certificate or agreement containing assurances that the property "will not be leased, sold, donated or otherwise disposed of to any private individual or corporation, or to a quasi-public organization during the operation of the project" and would be "maintained by the Women's Club and operated for the benefit of the general public," was executed September 7, 1938, by the Mayor and Treasurer of the City of Macon and by the President and Treasurer of the Women's Club House Commission (Intervenors' Exhibit M at A. 453).

The Women's Club continues to occupy the clubhouse in Baconsfield Park, using the building free of charge and without paying rent either to the City or to the Board of Managers. The Women's Club charges fees for various organizations which use the building for meetings, but none of these funds go to the City or to the Board of Managers (A. 159-164; 221-222; 232-234). Mayor Merritt of Macon testified that he has attended meetings at the Clubhouse of such organizations as the Georgia Legal Secretaries Association, the Georgia Milk Dealers Association, and several other local associations of various types (A. 161-163).

The minutes of the Board of Managers of Baconsfield indicate that the Board permitted the Highland Hill Baptist Church to use the Baconsfield Clubhouse as the temporary meeting place for the church during the construction of the church. The Board voted this permission for the church to use the Clubhouse at its meeting of June 25, 1953, notwithstanding its attorney's advice that this use was not permitted by Senator Bacon's will (Exhibit A, Minutes of 6/25/53; A. 296-298). A letter from the Chairman of the Board of Deacons of Highland Hill Baptist Church thanking the Board for the use of the Clubhouse as a meeting place for the church was read at the Baconsfield Board meeting of May 17, 1955 (Exhibit A, Minutes of 5/17/55; A. 311).

Public Roads in the Park

Certain roads running through Baconsfield Park were paved and developed by the City (A. 167-169; 202-203; see also Intervenors' Exhibit A, Minutes of 5/17/55 (A. 312-313). On several occasions the Board of Managers resolved to seek federal funds for the paving of roadways in the park, but the record does not indicate whether any federal highway funds were actually obtained (see Intervenors' Exhibit B, Minutes of 3/30/36 (A. 247-248); 6/28/38 (A. 253); and 10/12/38 (A. 247-248)). On one occasion the City paid the Board of Managers the sum of \$1,000 as "partial reimbursement from City of Macon for paving in Baconsfield." (Intervenors' Exhibit A, financial statement following Minutes of 10/16/47; A. 393).

City-Built Swimming Pool and Bathhouses at Baconsfield

As early as 1936, the Board of Managers of Baconsfield began discussing the desirability of constructing a swimming pool in the park, and the discussion of government

aid for a pool continued for years (Intervenors' Exhibit B, Minutes of 6/29/36 (A. 249), 7/30/36 (A. 251), 12/7/36 (R. 517), 12/14/44 (A. 260), 5/30/45 (A. 262-268)). Finally, on June 3, 1947, the Chairman of the Board of Managers met with the Mayor and several aldermen of Macon and "strongly urged" that the City appropriate \$100,000 to build a pool in Baconsfield. (See Intervenors' Exhibit A, Minutes of 6/3/47; A. 281-282). The City agreed to this suggestion and on July 22, 1947, resolved to deliver the sum of One Hundred Thousand Dollars to the Board of Managers of Baconsfield to be used by the Board for the construction of a swimming pool. (Intervenors' Exhibit I; A. 389; see also, Intervenors' Exhibit V; A. 418.) Subsequently, the City appropriated an additional Forty Thousand Dollars on December 23, 1947 to the Recreation Department to construct bathhouses at Baconsfield pool (Intervenors' Exhibit I; A. 389). The Baconsfield minutes indicate that the Board of Managers accepted the \$100,000 grant and designated the Chairman and Secretary of the Board of Managers and the Chairmen of the City Council's Finance and Recreation committees to act as agents to construct the pool and disburse the funds from a special swimming pool account. (Intervenors' Exhibit A, Minutes of 8/4/47; A. 285-287.) A large community swimming pool and adjacent buildings were constructed in 1948 on a portion of the Baconsfield land designated in Bacon's will as income-producing property. After the pool was constructed the Board of Managers and the City entered into a contract by which the pool was leased by the Board to the City for a two year term, to be automatically renewed for successive two year terms unless either party terminated the lease or the City breached its covenants (Heirs' Exhibit D; A. 384-388). The City agreed to operate the pool:

... as a part of the pleasure and recreational facilities of Baconsfield, for the enjoyment and benefit of

the beneficiaries of the trust for Baconsfield, as set up and established in the said last will and testament of the said A. O. Bacon, deceased, and also for other persons who are or may be admitted to Baconsfield (A. 385).

The City agreed to bear any losses in connection with the pool operation, and to share any profits with the Board. No payments to the Board were made under this provision (Heirs' Exhibit H and attached letter; A. 470-474). The City made additional capital expenditures at the pool and related facilities over the years for improvements, including the following amounts (Heirs' Exhibit H; A. 473):

1948	\$ 4,999.57
1960	6,079.21
1962	6,360.55
<hr/>	
\$17,439.33	

The sum of \$1,084.93, which remained in the old swimming pool account was transferred to the regular account of the Board of Managers in 1959. (Intervenors' Exhibit A, Minutes of 5/8/59; A. 326, and financial statement following Minutes of 10/29/59; R. 456.)

The pool was finally closed and the lease cancelled in 1964 in order to avoid racial desegregation as required by the Fourteenth Amendment. In April 1963, following attempts by Negro groups to integrate the park, the Board resolved to cancel its contract with the City relating to the pool and to attempt to negotiate a contract with a private party for operation of the pool (Minutes of 4/9/63; A. 334-335). At the same time, the Board directed its attorneys to commence this lawsuit to remove the City as trustee (*Id.*). The swimming pool contract was finally cancelled

in May 1964. The Board's attorney wrote a letter to Mayor Merritt dated May 22, 1964 (Intervenors' Exhibit X; A. 458-460) stating that it was cancelling the pool lease because of the City's inability to enforce racial segregation at the pool. The Mayor replied by letter dated May 28, 1964 (Intervenors' Exhibit Y; A. 461), acquiescing in the termination and relinquishing control of the pool to the Board of Managers. The swimming pool has remained closed since that time, and has not been maintained or kept in repair since 1964. Nearby highway construction which interfered with the pool area during a period of time has now been completed, but the pool remains closed.

City Operated Zoo

The City established a zoo in Baconsfield Park, with caged animals, including monkeys, a bear, ducks, rabbits, a raccoon, a few deer, and a few peafowl and pheasants. (Answer to Interrogatory No. 2; A. 133.) Mayor Merritt stated that the zoo included 40 or 50 monkeys (A. 154). The zoo was closed and all the animals and cages removed after the City resigned as trustee in 1964. While the zoo was in operation the City employed a full-time employee at Baconsfield to take care of the animals (A. 155-156; 201, 208). The Public Works Department of Macon dismantled the zoo (R. 208).

Public School Playground

A playground in the Baconsfield Park is regularly used as the school playground for a nearby public school operated by the Bibb County Public School System (A. 173-174). The school is Alexander School Number 3, a previously all white elementary school, which it was anticipated would be attended by a small number of Negro pupils living in the neighborhood under the school district's desegrega-

tion plan. (Intervenors' Exhibit W, Stipulation No. 2; A. 456-457.) The school personnel supervise the children in using the playground in Baconsfield (A. 173-174; 178-179). The Bibb County Board of Education was responsible for having the playground installed, including basketball courts (A. 180, 192). Prior to 1964, the City Recreation Department had an employee assigned to the playground at Baconsfield to supervise the children. The City spent an average of \$1,180.70 per year to employ someone at the playground prior to February 1964 (A. 175-179).

City Leased Building

From 1954 until the present time, the City has leased a building referred to as the Open Air School from the Board of Managers and paid the Board a rental of \$300 per annum. (Exhibit A, Minutes of 6/24/54; A. 301; A. 181-184.) This is a one story brick building located in the portion of the Baconsfield property set aside for raising revenue (*Id.*). The City in turn makes the building available, free of charge, to the Macon Young Women's Civic Club for the activities of the "Happy Hour Club," an organization of elderly people (*Id.*). The building was previously occupied by the Board of Education rent free (Intervenors' Exhibit B, Minutes of 7/10/41; R. 541).

City-Aided Recreation Facilities

A Little League baseball field located in the park was constructed in part with the aid of the City which dumped 100 to 200 truck loads of dirt in a low area of Baconsfield where the field is now located (A. 164-165). The financial records of the Board indicated that it made a "part payment" to the City for filling in the play area in the amount of \$3,500. (Exhibit A, financial statement following Min-

utes of 12/18/56; R. 437.) The minutes do not indicate any subsequent payments.

Several tennis courts are maintained in the park. The City of Macon assisted in installing lights at the tennis courts to permit play at night. (A. 169-170; Minutes of 7/24/62; A. 330.) In 1964, the Board of Managers granted to the Macon Tennis Club, a private club, permission for the club to regulate play at the Baconsfield Tennis Courts according to the rules of the club, and permission to maintain the tennis courts. (Intervenors' Exhibit A, Minutes of 4/10/64; R. 492.)

Sale of Portion of Trust Property to State

During World War II, when informed that the War Department wanted a strip of land to open a roadway, the Board and the City sold a strip of land from the area of Baconsfield devised by Senator Bacon as income-producing property to the State Highway Board of Georgia. (See the deed and attached resolutions, Intervenors' Exhibit H; R. 655-660.) The Board of Managers received a check in the amount of \$1,500 from the City of Macon in this transaction. (Intervenors' Exhibit B, Minutes of 3/3/42; R. 542-543, and financial statement following Minutes of 12/15/44; A. 261.)

Tax Exemption

The Board of Managers has never paid any taxes, federal, state, or local, on the Baconsfield property or on any of the income they have received. The property has always been treated as exempt from taxes under Georgia laws. (See Financial Statements in Intervenors' Exhibits A and B, *passim*; see also A. 184, 196.)

Income Property

The income-producing area of the trust property now includes a shopping center with several business, including a filling station, pharmacy, ice cream store, etc. The rental income of the Board of Managers during calendar year 1966 was \$7,058.37. (Computed from Intervenors' Exhibit C; R. 569-592.) The rental income received during the period April 1, 1963, to March 31, 1964, was \$5,225.04 (R. 346). During the years the Board also has received payment for various types of utility easements on the property. In 1958, the Board received \$3,500 from the City Board of Water Commissioners for a sewer easement. (Intervenors' Exhibit A, financial statement following Minutes of 5/8/58; A. 324.) The State Highway Department acquired 26.932 acres of land in Baconsfield by condemnation proceedings in 1964 to construct a portion of Interstate Highway 16. (Heirs' Exhibit I; A. 476.) The Board of Managers was awarded the sum of \$131,000 in the condemnation, and the Court ordered that sum paid to the Chairman of the Board of Managers to be invested in short-term government bonds and to be held subject to the further order of the court pending the outcome of proceedings in the instant case (*ibid.*).

Assets of the Estate

The assets as of April 17, 1967, held by the First National Bank & Trust Company in Macon, as agent for the Board of Managers of Baconsfield, were stated by the Bank as follows (Intervenors' Exhibit D; R. 594):

"ASSETS:**Cash:**

Principal Cash Overdraft	\$ 266.44
Income Cash Balance	9,443.67
	<hr/> \$ 9,177.23

Property:

Real Estate	255,000.00
U. S. Treasury Bonds	136,434.98
Savings Account First National Bank	7,795.05
	<hr/> 399,230.03

Total Assets	\$408,407.26
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LESS:

Real Estate	255,000.00
Highway Right of Way Fund	143,766.92
	<hr/> 398,766.92
Rent Accumulation	\$ 9,640.34"

The original trust fund of \$10,000 in bonds left by Senator Bacon, was long ago "depleted" according to the City (City's Answer to Interrogatory No. 13; A. 116).

An accounting filed by the successor trustees with the court below on June 3, 1968, showed the total trust assets to be \$404,810.77, including a book value for the real estate of \$255,000 (R. 1055).

How the Federal Questions Were Raised and Decided

The petitioners' federal constitutional objections to the order of the court below ruling that the Baconsfield Park property had reverted to the heirs were stated in their Response to the motion for summary judgment (A. 119-122) and in their several supplemental responses (A. 242,

393, 454; R. 971). The federal constitutional objections were repeatedly and elaborately articulated. The following excerpts from the Supplemental Response and the Second Supplemental Response represent the general thrust of petitioners' argument as stated to the Superior Court:

The entry of a judgment to the effect that the trust properties should revert to the heirs of Senator Bacon would violate the intervenors' rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, in that:

(a) A Judicial decree of reversion would not implement the intent of Senator Bacon's will, which expressed the legally incompatible intentions that (1) Negroes be excluded from Baconsfield Park, and (2) that Baconsfield Park be kept as a municipal park forever. A judicial choice between these incompatible terms must be made in conformity with the said Fourteenth Amendment. The affirmative purpose of the trust, to have a park for white people, will not fail if the park is opened for all, and for the court to rule that the mere admission of Negroes to the park is such a detriment to white persons' use of the park as to frustrate the trust and cause it to fail, would be a violation of the said Fourteenth Amendment. (A. 242-243)

* * *

An application of the reverter doctrine or other doctrine finding a failure of the trust on the facts of this case would amount to a judicial sanction which imposed a penalty because the agencies managing Baconsfield Park fulfilled their Fourteenth Amendment obligation to operate the park on a racially non-discriminatory basis. The use of such a judicial sanction in these cir-

cumstances would violate the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (A. 399)

— 6 —

The due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States require that the racially exclusionary words of Senator A. O. Bacon's will relating to Baconsfield Park be treated by the courts as *pro non scripto* as though they were never written. This is required, firstly, because the racially exclusionary terms were written in the will to conform to racially exclusionary suggestions and requirements of Georgia Code Section 69-504 (Georgia Acts 1905, p. 117). The racial portions of Section 69-504 are void under the Fourteenth Amendment, and indeed were void *ab initio* even under the "separate but equal" doctrine, by authorizing the total exclusion of Negroes from public parks, and thus must be regarded as *pro non scripto*. Secondly, it is required because by the City's acceptance of the park, pursuant to Georgia Code Section 69-505 (Georgia Acts 1905, pp. 117-118), and its operation of the park in accordance with Bacon's will, the will was made a part of the City's own laws governing the operation and use of the park, and is to be treated in the same manner as if the racially exclusionary words appeared in a city ordinance. (A. 399-400)

— 9 —

By virtue of all the facts and circumstances presented on the record of this case the City of Macon has so invested the Baconsfield Park with a public

character, and the City has become involved to such an inextricable extent, that it would be a violation of the intervenors' rights under the due process and equal protection clauses of the Fourteenth Amendment for the state courts to apply any state law doctrines (whether relating to trust law, the law of dedication, real property law, or other principles), so as to defeat the rights of the intervenors to racially non-discriminatory use and access to the park as a public park (R. 401-402)

Before the Superior Court the constitutional claims were argued orally and were presented in full written briefs. The ruling of the trial court on petitioners' constitutional arguments was brief and general. The court stated in its order of May 14, 1967 (A. 519-520) :

It is my opinion that Shelley vs. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.ed. 1161 (1948), does not support the position of the intervenors. It is further my opinion that no federal question is presented in regard to the reversion of Baconsfield, but rather this property has reverted by operation of law in accordance with well settled principles of Georgia property law.

The federal questions were preserved on appeal by appropriate enumerations of error and again fully briefed before the Supreme Court of Georgia. The Supreme Court of Georgia also rejected petitioners' constitutional arguments on the merits. The court stated at the conclusion of its opinion (A. 545) :

6. The intervenors urge that they have been denied designated constitutional rights by the judgment of the Supreme Court of Bibb County holding that the trust has failed and the property has reverted to Sen-

ator Bacon's estate by operation of law. We recognize the rule announced in *Shelley v. Kraemer*, 334 U.S. 1 (68 SC 836, 92 LE1161, 3ALR2d 441), that it is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution for a state court to enforce a private agreement to exclude persons of a designated race or color from the use or occupancy of real estate for residential purposes. That case has no application to the facts of the present case.

Senator Bacon by his will selected a group of people, the white women and children of the City of Macon, to be the objects of his bounty in providing them with a recreational area. The intervenors were never objects of his bounty, and they never acquired any rights in the recreational area. They have not been deprived of their right to inherit, because they were given no inheritance.

The action of the trial court in declaring that the trust has failed, and that, under the laws of Georgia, the property has reverted to Senator Bacon's heirs, is not action by a state court enforcing racially discriminatory provisions. The original action by the Board of Managers of Baconsfield seeking to have the trust executed in accordance with the purpose of the testator has been defeated. It then was incumbent on the trial court to determine what disposition should be made of the property. The court correctly held that the property reverted to the heirs at law of Senator Bacon.

Summary of Argument

Federal law entirely governs the crucial issues in this case. As both venerable and recent decisions of this Court established beyond doubt, no area of state law and no action of any state agency, whether in the field of trusts or anywhere else, is immune from total control by the Constitution. Petitioners contend that the Fourteenth Amendment has been violated in this case, thus tendering a purely federal question. *Martin v. Hunters' Lessee*, 1 Wheat. 304 (1816); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, US , 37 U.S.L. Week 4107 (1969).

The action of the court below violates the Constitution in that it imposes a drastic forfeiture on the mere fact of the City's compliance with federal law. The only possible excuse for this (an excuse whose extreme doubtfulness need not be argued in this case) would be the testator's definite command, but the record unequivocally shows, and the court below admits, that the contingency now dealt with in this way never entered the testator's mind and that he made no provision, definite or indefinite, for action such as that taken by the court below. Thus, it is the choice of the Georgia court, that this reversion is to occur on a showing that Negroes must be allowed to use the park. Aside from its naked character as a penalty on municipal compliance with federal law, this action constitutes a strong potential encouragement of racial discrimination. Petitioners, as Negroes in whose favor the constitutional guarantees primarily run, and as citizens of Macon who will lose a public park if this reverter is enforced, have standing to rely on this ground. *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Crandall v. Nevada*, 73 U.S. (6

Wall.) 35 (1867); cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).

Secondly, since the intended white beneficiaries of Bacon's trust may still use the park as freely as ever the judgment that the "uses of the trust" have "failed" (Georgia Code §108-106(4)) must logically rest on the premise that for Negroes to use it as well so impairs white enjoyment as to produce "failure." The record is absolutely silent on this impairment, so that the premise is one of pure law. Cf. Mr. Justice Stewart's concurring opinion in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961). This is beyond question a proposition on which no state court judgment can be allowed to rest, under the Fourteenth Amendment, for it goes even further than an "assertion" of Negro "inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). It is immaterial that this proposition doubtless was not consciously present in the Georgia court's mind; it is a proposition logically necessary to the conclusion that the "uses" of this trust—enjoyment by whites—have "failed" (Georgia Code §108-106 (4)) when all that has changed is that Negroes in uncertain numbers may be present. Having, under Georgia law, an easy alternative to this decreeing of "failure," in the Georgia *cy pres* statutes, the Georgia court refused to use it, a decision which logically must rest on a proposition very similar to the one just identified. See *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Pennsylvania v. Brown*, 392 F.2d 120 (3rd Cir. 1968), cert. denied, 391 U.S. 921 (1968).

Thirdly, the discriminatory provision in Bacon's will was incurably tainted by its evident connection with §69-504 of the Georgia Code authroizing racial discrimination and only racial discrimination in trusts for public parks. A provision so tainted ought to be unusable, not merely

affirmatively, but for any practical purpose. *Mapp v. Ohio*, 367 U.S. 643 (1961); see Mr. Justice White's concurring opinion in *Evans v. Newton*, 382 U.S. 296 (1966).

Fourthly, the racially discriminatory term in Bacon's will should be treated as a nullity, *pro non scripto*, for two reasons. The first reason is that it was intended to become and did actually become a part of the public law material of the city of Macon; its character as such (evident enough in any case) is incontestably established by Georgia Code §69-505. Having this character, it should simply be stricken, as a city ordinance commanding racial discrimination would be stricken. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955). The second reason is that this park, which by Georgia law was beyond any doubt "dedicated in perpetuity" to the whites, must by virtue of the federal command of racial equality be "dedicated in perpetuity" to the blacks. The park, by virtue of this federally commanded addition to Georgia law, then stands "dedicated in perpetuity" to all.

All of the above arguments are greatly strengthened and reinforced by the impressive showing in this record of long-continued and heavy public involvement in the park's maintenance and control.

ARGUMENT

I.

Introductory: State and National Law.

One overriding point must initially be made. Respondents have introduced into this case, in their Brief in Opposition to Petition for Certiorari, at p. 15 and *passim*, an idea that seems to govern strategically the view of the case which they would have this Court take:

Respondents submit that the petition for a writ of certiorari should be denied because the decision of the Supreme Court of Georgia involved nothing more than the application of well-settled principles of Georgia law to a Georgia will. No rights guaranteed petitioners by the Fourteenth Amendment have been denied; nor is the decision of the Georgia court in any way inconsistent with the decision of this court in *Evans v. Newton*, 382 U.S. 296 (1966).

This Court has scrupulously adhered to the rule that the highest court of a state may administer its statutory and common law according to its own understanding and interpretation (see, e.g., *American Railway Express Co. v. Commonwealth of Kentucky*, 273 U.S. 269 (1927)), and especially where the law which is being administered by the state tribunal is property law (see *Tyler v. U. S.*, 281 U.S. 497 (1930)), or where the case involves the construction of a will. As this Court stated in *Lyeth v. Hoey*, 305 U.S. 180, 59 S.Ct. 155 (1938):

"The local law determines the right to make a testamentary disposition . . . and the condition essential to the validity of wills, and *the state courts*

settle their construction." 59 S.Ct. at 158. (Emphasis supplied.)

At the very beginning, in application to each and every argument that is to follow, petitioners deem it necessary to confront this idea (surely valid as far as it goes) with its obvious and beyond all doubt equally valid limitation—that no state law and no state act, in any field, from automobile traffic to contingent remainders, can prevail in the face of federal law, and that no state court holding can stand in the way of a federal court's examining the fact and truth of any transaction, for determining whether, in practice and not only in theory, the Constitution has been violated. The Constitution protects against *actions*, and not only against maladroit or erroneous classifications and concepts. This has been clear at least since *Martin v. Hunters' Lessee*, 1 Wheat 304, 357-360 (1816); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938). Petitioners have no interest in questioning the *general* right of the Georgia court to deal with trust questions. But when it is claimed, as petitioners here claim, that the *particular* dealing at bar violates, in multiple ways, the Fourteenth Amendment, it is entirely unresponsive to set up the general proposition that state courts ordinarily deal with these matters, where federal law is not implicated. U. S. Constitution Article VI.

Respondents' own cases, cited in the just-quoted passage from their Brief in Opposition, in fact illustrate not only the general proposition, but also the exception. In both *Tyler* and *Lyeth*, having paid due respect to state law and state courts, this Court went on to say and to hold that these cannot control the incidence of federal taxation. See *Tyler v. United States*, 281 U.S. 497, 503 (1930); *Lyeth v. Hoey*, 305 U.S. 188, 193 (1938). Unless the Fourteenth Amendment is of lesser dignity than a tax statute, the very same thing is true in this case.

The Georgia court has the general power to say when, *under Georgia law*, a trust has terminated. But that only opens, and does not by any means close, the question whether the Georgia court's holding, in all its bearings and on all the facts, results in a violation of the Fourteenth Amendment.

It is very striking that no longer ago than last Term the Georgia court's decree declaring a trust to be terminated was in this Court reexamined, in the light of a claim that the action violated the First Amendment, and unanimously reversed—Mr. Justice Harlan concurring specially not because of any belief that Georgia controls her own trust law without the necessity for responding to the federal Constitution, but solely because of a desire to state his understanding of the limits to the holding on the merits. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, U.S. , 37 U.S.L.W. 4107 (1969). This recent case should finally leach out any lingering chemical trace of the notion that a state court has some special plenary power over trusts, without entire subjection to federal constitutional norms.¹

¹ The recently decided case of *Pettway v. American Cast Iron Pipe Company*, — F.2d — (5th Cir., No. 25826 May 22, 1969), involved a trust created by the owner of the business. He willed the entire company in trust to his employees in 1924, with certain racial conditions as to the composition of those bodies responsible for management. While the case itself contained no issues regarding this trust and was decided on grounds altogether unconnected therewith, it does suggest an interesting question. Suppose the owner of a business were, in 1924, to have willed that business in trust to his employees with a provision in the trust instrument to the effect that no Negro should ever be employed by the company. After the passage of the Civil Rights Act of 1964, such a provision would clearly become unlawful and could not be followed. Is it possible that this Court would allow a state court to decree the reversion of the company to the heirs of the settlor on the ground that state courts were a law unto themselves when it came to the question of whether a trust had terminated?

The absolutely general subjection of state judgments to federal norms could be illustrated over a range as wide as the history of the Republic. Perhaps it is enough to cite *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964), where the state libel law—normally, of course, a matter of state concern—was in effect drastically revised to make it chime with the federal Constitution. As this Court said in that case, in words equally applicable to this case: “It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.” 376 U.S. at 265.

The petitioners in this case are putting forward definite claims that the action of the Georgia court violates the Fourteenth Amendment in a number of ways. These claims cannot be answered by suffusing the discussion of them with a general feeling-tone of deference to the Georgia court’s dealings with trusts. If no important or substantial federal claim is present in this case, then the writ of certiorari was improvidently granted. If one or more substantial and important federal questions are present, then this Court alone, on the record before it and on the uncontested facts in that record, is the one final authority on the question whether what has been *done*—and not merely what the Georgia court has said has been done—violates the Constitution.

All the arguments that follow point to different aspects of a single plain factual pattern: by testamentary disposition and by Georgia law, in intricate and intended coaction, a public park was limited to whites. The flagrant unconstitutionality of that limitation is conceded by all. By the present decree of the Georgia court, this provision is nevertheless given a drastic affirmative effect. The question whether such an effect can be given to a flagrantly unconstitutional set of arrangements is a federal question, and only a federal question.

II.

The Decree of the Court Below Violates the Fourteenth Amendment, in That It Is Hostile to and Infringes Petitioners' Right to Continue to Enjoy Public Facilities Without Racial Discrimination.

A. The Decree of the Georgia Court Imposes the Drastic Sanction of Reverter on Compliance With the Fourteenth Amendment, and in so Doing Infringes Upon a Federal Interest Declared and Created by the Constitution, at the Same Time and by the Same Act Inflicting Detriment on the Petitioners and Encouraging Racial Discrimination.

The immediate contemporary facts presented by this record are simple and *prima facie* damning. A park was being operated by the city of Macon as trustee, and by a Board of Managers appointed by the City Council. The Fourteenth Amendment says that Negroes may not be excluded from a park so operated. Macon accordingly allowed Negroes to use the park. Upon this showing, the Georgia court decrees the extreme penalty² of forfeiture of the property.

On the face of it, this constitutes a direct and drastic interference by the state of Georgia with a course of events charged with that high and positive federal interest which attaches to the commands of the Constitution. It is the command of the Constitution that all races use any park run by the City, or by a Board of Managers appointed by the City, or by both in coaction. This command, like all constitutional commands, states and implements a na-

² Petitioners choose "penalty" as the handiest word for what the action taken undoubtedly is—the imposition of a drastic and detrimental consequence on a showing that Negroes must be allowed to use the park. It is the fact and not the word that matters. Cf. Brief in Opposition to Certiorari, p. 18.

tional interest. State power in no form, and on no state-law doctrinal basis, may take action hostile to a federal interest so expressed, or penalize that which the Constitution commands. *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948); and *Barrows v. Jackson*, 346 U.S. 249 (1953).

It is quite beside the point that if this park be forfeited the exclusion of Negroes might *thereafter* not constitute a violation of the Fourteenth Amendment, for *it is the forfeiture itself*, decreed by the Georgia court in this case, which constitutes the sanction hostile to the federal constitutional command.³

It is clear, in addition, that this action of the Georgia court will operate widely as a discouragement to expeditious and voluntary compliance with the Fourteenth Amendment, and will encourage racial discrimination, *contra* the decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967). If this Georgia decision stands, it will be taken as a strong precedent supporting the proposition that state courts may generally decree reversion of property for breach of racial conditions. The use of this device by draftsmen, and compliance by those placed *in terrorem*, will undoubtedly be significant.

Where, as here, the reverter occurs as to public property, Negroes will be discouraged from asserting their rights, since they will know (and doubtless will be told) that such assertion would be a futility, since reversion would attend their success; this might be of little significance in Macon, but it might well be highly significant in small communities with few Negro inhabitants. Cities, reciprocally, would be

³ This is the sufficient answer to respondents' point in their Brief in Opposition, p. 17, first full paragraph.

encouraged to evade as long as possible their duty to integrate. Where a trust instrument or deed so much as raised a doubt as to its interpretation or validity, the plain duty of non-discrimination might be evaded by prolonged and exhausting litigation.

A potential discouragement of racial equality need not be absolutely certain or highly substantial in order to offend the Constitution. See *Robinson v. Florida*, 378 U.S. 153 (1964), where the fact that a restaurateur, if he should desegregate, would be directed to put in separate toilets, was held sufficient discouragement to make unconstitutional his discriminatory rule. The effect of the affirmance of the present decree would beyond question rise to a higher order of magnitude than the effect of the regulation in *Robinson*.

It is true that the detriment here imposed for failure to keep Baconsfield white is not one finally avoidable by keeping Baconsfield white, since that is forbidden by the Fourteenth Amendment. It might be argued, then, that the sanction of reverter does not in this case foster racial discrimination, since the racial discrimination involved cannot permissibly occur in any case. The consequence of this argument would seem to be an absurdity—that a state may impose any forfeiture it likes on the performance of a compelled federal duty, even though it cannot impose any forfeiture on the same act when that act is not a federal duty. If the argument had force, a state could fine a man, in a moderate sum, for paying his federal income tax, since he has to pay that tax anyway, and hence cannot be influenced not to pay it by the fear of a small fine. Sound federalism is not built of such scholastic spider-webs. The imposition by a state of a forfeiture, on a showing that a federally imposed duty has been or will be performed by a municipality, is as noxious an interference

with national supremacy as can well be imagined. U. S. Constitution, Art. VI; see *McCulloch v. Maryland*, 4 Wheat. 316 (1819); *Crandall v. Nevada*, 73 U.S. 35 (1867).⁴

A state which would thus impose a drastic forfeiture of property as a penalty for obedience to the Constitution, and, moreover, do so in a way that effectively discourages the assertion of federal rights and encourages their denial, must surely come forward with some justification. The only justification even specious must be looked for in Senator Bacon's will. On examination, there are here two possibilities, one of which is totally and clearly demurrable, and the other of which, being entirely unsustained by the record, is admitted by the Georgia court not to exist in fact.

First, Senator Bacon clearly and seriously desired that Negroes be excluded from this publicly operated park. But neither he nor any other person has any lawful power to command such a result. That result can be attained only by the repeal of the Fourteenth Amendment. Senator Bacon's desire in this regard is no more effective in law than would have been an express direction that a colored citizen of Macon chosen by lot stand in the stocks in the park every Sunday. There can never have been any doubt about this, since at least 1956, and no party connected with this case ever seems to have doubted it, but any possible doubt was laid at rest by the decision of this Court in *Evans v. Newton*, 382 U.S. 296 (1966).

A quite different expressed or implied desire of Senator Bacon might be brought forward as justification for what

⁴ Reference is here made to footnote 1 above. Unless it be true that a state court may validly decree forfeiture of property for the violation of any directions of a settlor, though compliance with those directions would constitute a flagrant violation of national law, there is no possible way to sustain the judgment in the case at bar.

has been done; it might be said that Senator Bacon intended, desired, or willed the destruction of the park and the reversion of this property to his heirs if Negroes had to be allowed to use the park. If such intent was discernible, or inferable, an interesting question would be presented. The categorical fact is, however, that Senator Bacon's intent, desire, or will in this regard is unknown and unknowable, and in overwhelming probability never was so much as formed. The Georgia court admits this unmistakably, saying that the reversion which it decrees occurs "because of a failure of the trust, *which Senator Bacon apparently did not contemplate and for which he made no provision.*" (A. 543) (emphasis added). Respondents make the same admission in their Brief in Opposition to Certiorari at p. 23.

Despite these admissions, which entirely cover the ground, it will be useful briefly to show how thoroughly unknowable Senator Bacon's intent in this regard must remain.⁵ First, the Bacon will, and this whole record, are

⁵ Petitioners are here so laboring this point because respondents, in their Brief in Opposition to Certiorari, *passim*, have sought to convert this case into one involving the mere "construction" of a will. On the only point that matters—whether Bacon would have preferred the total collapse of his plan for a park to the presence therein of Negroes—the will contains no basis for "construction." Curiously, respondents virtually concede this, citing a passage from Scott on Trusts which says that, in circumstances like these, "all the court can do is to make a *guess* not as to what he intended but as to what he would have intended if he had thought about the matter." Brief in Opposition, p. 23. (Emphasis supplied.) The very passages from Bacon's will which respondents quote (Brief in Opposition, pp. 4-7) state as solemnly as language can do his wish that the property be kept a park forever. Respondents ask, then, that this Court respect a "construction" of a will which the Georgia court itself admits has no basis in a demonstrated or in any way knowable intent of Senator Bacon, and which respondents themselves virtually concede to be a mere guess. Any action at this time will necessarily do violence to Senator Bacon's expressed intentions; it is to the last degree misleading to stress that

absolutely silent on this point. One must therefore recur to the probabilities. The question (an unanswerable one) then is: Would this Georgian who died over fifty years ago prefer to have his lovely farm remain as a park with some Negroes using it along with whites, or would he prefer to have it become mere city real estate, fully alienable, subject to all the vicissitudes affecting such property through the decades and centuries? On the latter alternative, Negroes certainly cannot be excluded. If a restaurant is opened on the property, Negroes must be served. If rent property is erected, Negro tenants cannot be rejected. If there are sidewalks, Negroes cannot be kept off them. If a church is erected, a mixed couple may be married in it. Senator Bacon's announced ground for his exclusionary policy—the prevention of "social relations" among the races—cannot be attained, even as to this property, by a reversion, except for so long as it remains completely "private" and in the hands, by chance, of a special sort of "private" owners. What wise lawyer in 1911 would have thought that alienable city real estate, descending from heir to heir, could be kept completely "private," and in the hands of those who would prevent racial interrelation?

Senator Bacon, moreover, formed and expressed his desire for racial exclusion against a background of seemingly permanent and general racial separation. His desire for his park was congruent with the social system in which he lived. If he had known that separation of the races in public facilities of all sorts was to become impossible in

one action—maintenance of the park with Negroes in it—will violate Senator Bacon's will, while utterly submerging the fact that the other action—destroying the park forever—will also cardinally violate Senator Bacon's will. It is submitted that, while a state court may "guess" as it wishes on matters federally indifferent, no state court, on the basis of a mere "guess," can destroy a public facility on a showing that Negroes must use it.

Georgia, would he have preferred to let his farm become city real estate rather than let it be a park conducted on the same lines as all other public facilities in the State?

Of course, no one can know the answer. Contrary to suggestions in the respondents' Brief in Opposition to Certiorari, petitioners do not themselves pretend to be able to answer, and are not asking this Court to answer, either *de novo* or by second-guessing the Georgia court. What petitioners assert, on the contrary, and what they take to be conceded, is precisely that no one can give the answer—whether approving or disapproving of Bacon's "social philosophy." (Brief in Opposition, p. 19.) What petitioners insist is that it is clearly shown that Bacon *did not* choose between reversion and Negro presence. No one, then, is left to choose, except the Georgia court. Its choice, the anti-Negro choice, violates the Fourteenth Amendment, whether it be called a "guess," an item in "social philosophy," or anything else at all.

No party in this case, as it now stands, has any claim to be considered as the agent of Senator Bacon's wishes. The admission of the Georgia court to this effect is compelled by the record.

The state of Georgia, having acted through its courts to decree forfeiture of public property on a showing that Negroes have used it and must be allowed to use it, cannot (and does not), therefore, proffer the justification that it is merely carrying out the command of a private testator.⁶ The only possible justification remaining is that the reversion occurs "by operation of law." But law "operates" as a human act; in this case the act is that of the Georgia court. Cf. *Erie R.R. v. Tompkins*, 304 U.S. 69 (1938).

⁶ It is highly questionable whether even that justification would suffice, but petitioners need not here argue the point.

For a more recent illustration even more directly concerned with the case at bar, see the language quoted above at p. 39 from *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). Georgia may have any rules of trust law she desires, declaring these by statute or by judicial decision. Or she may, if she wishes, have no law of trusts at all. The one reservation is that no state law, particular or general, legislative in origin or judicially fashioned, concerning "failure of trust" or concerning anything else, may penalize obedience to federal law. (See *supra*, I.) The ruling below does just that.

It cannot make any difference that the Georgia court, or the respondents, choose to look on the case as one where the trust "merely" fails. The "failure" of a trust, like the termination of a fee, is not a happening in the order of physical nature, which a court observes and records. It is a holding in the legal order, which the court by its decision declares and enforces. The actuality is that application is made to the *court* for affirmative judgment, and it is that affirmative judgment which, to all intents and purposes, brings about and even constitutes the "failure." In application to the present case, this point is highly practical as well as soundly philosophic; no one could possibly have guessed what the status of this park was to be until the Georgia court declared its reversion.

In their Brief in Opposition to Certiorari, at pp. 19 and 25, respondents cite *Charlotte Park and Recreation Commission v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956), wherein the North Carolina court gave effect to an *explicit provision* for the determination of a fee upon use of a golf course by Negroes. Of course, that case has no authority here, on familiar principles applicable to the denial of certiorari. It was, more-

over, decided before the thorough-going effect of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its sequel cases, was felt in the state courts. Even so, properly read, it tells strongly against respondents' position. For, while it gave effect to a termination clause that *explicitly* provided for termination on use by Negroes, it refused to decree termination with respect to a second deed which clearly provided (as clearly as Senator Bacon's will) that Negroes were not to use the golf course, but which failed *expressly and in just those words*, to provide for termination on the happening of this event. 88 S.E.2d at 124. On the level of federal law, this is a most meaningful distinction. Petitioners do not concede (the point not being in issue here) that even an express provision for termination may be judicially implemented. But the state court is playing a far more active role than that—as the North Carolina court seems to recognize—when it *supplies for the parties* a provision for termination that is not in the instrument. That is just what the North Carolina court would not do, and just what the Georgia court has done. The difference is a federal-law difference, for it is a difference in the degree or even the kind of affirmative action by a state agency.

These petitioners have standing to assert the ground developed in this section. The constitutional norm against racial discrimination, obedience to which is being penalized here, runs primarily in their favor. Cf. *Barrows v. Jackson*, 346 U.S. 249 (1953). These petitioners have, in addition, a direct and substantial interest in the treatment of the claim they here assert; if it is upheld, then the decree pronouncing reversion of this property is reversed, the park continues as a park, and these petitioners are (by force of the Fourteenth Amendment) entitled to use that park. *Evans v. Newton*, 382 U.S. 296 (1966). They have standing,

then, in both senses of the term—they are the centrally intended beneficiaries of the rule they invoke, and they will in fact benefit substantially from its application in this case. Furthermore, they are citizens of Macon, and the destruction of this park, though brought about formally by the divestiture of the city's title, falls substantially on them.

Although petitioners have standing, it is worthwhile noting how very widespread would be the impact of the penalty here imposed on the City's performance of its Fourteenth Amendment duty. In taking away this park, Georgia destroys values built up by many persons and entities. The City has spent money on the park—money contributed over the years by its citizens. The tax immunity enjoyed by this park has been, in effect, a huge subsidy at the expense of taxpayers of all races. The federal government has contributed to the creation and to the improvement of the park, in part after an *express* certification that it was a nondiscriminating public facility (A. 440-441). The decree of the Georgia court destroys all these values, repudiates this certification, and wipes out the deep and total public character which decades of maintenance and subsidy have given to Baconsfield—without any definite warrant for this step in Bacon's directions, and solely on the showing that the Negro members of the public may now use this public place.

It should be noted how profoundly the present record differs in this respect from the spare record in *Evans v. Newton, supra*. There, the case came up on the pleadings. Here, a full record has been made, and is before this Court, of prolonged public dedication and deep, multi-level governmental involvement. The step the Georgia court has taken constitutes the destruction of a facility in the widest

and profoundest sense public; the penalty for admitting Negroes falls on the past and the future.

B. The Judgment That This Trust Has "Failed," Though Its Intended Beneficiaries May Still Enjoy Its Benefits Just as Before, Can Rest Logically Only on the Proposition That, as a Matter of Law, the Presence of Negroes Spoils a Park for Whites, an Impermissible Ground Under the Fourteenth Amendment. The Rejection of the Cy Pres Alternative Must Rest on Substantially Similar Grounds.

The judgment of the Georgia court in this case must stand logically on a ground which the Fourteenth Amendment forbids any agency of the state government to occupy. Under Georgia Code §108-106(4),⁷ this trust ends, and a resulting trust for the heirs arises, only if the "uses" of the trust "fail." The holding, on analysis, then, must rest on the proposition that, as a matter of law, the presence or proximity of Negroes, in any number, causes the "use"—enjoyment by whites of a public amenity—to "fail." This premise, as to the Negro race, is worse than "an assertion of their inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). It is an assertion of their obnoxiousness. The Fourteenth Amendment strikes down a state decision resting, by irresistible implication, on such a shocking ground. See the opinion of Mr. Justice Stewart, concurring in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961). Just as, in *Burton*, there was no suggestion in the record that appellant was "offensive" to other customers, so there is no suggestion

⁷ Ga. Code §108-106(4) provides:

"*Trusts implied, when.*—Trusts are implied—

* * * * *

4. Where a trust is expressly created, but no uses are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs."

in this record that petitioners' presence "offends" whites to the extent of "frustrating" the purpose of a trust established for the benefit of the latter. Here, as there, the offensiveness of the Negroes is supplied, in effect, as a matter of law.

(Petitioners here would emphasize that they are not putting forward the suggestion that the members of the Georgia court held this idea in their minds; there is no reason whatever for any imputation of that kind, and petitioners would be sorry to be thought to have made it. What is being urged here is that, on a proper analysis, the *logical* implication of the holding turns out to be as petitioners here urge.)

The affirmative "purpose of the trust" established by Senator Bacon is not left obscure by him. It is the furnishing of a public park to the whites of Macon. That purpose has not to any degree been "frustrated," or "failed," in the normal sense of either of those words. *The whites of Macon may still resort to Baconsfield just as freely as ever.* There is not one scintilla of evidence in this record showing that the admission of Negroes as well either has diminished or faintly threatens to diminish the enjoyment of Baconsfield by whites. (If such evidence were ever to be offered in a proceeding of this sort, this Court would then have to consider whether such an issue of fact could ever be made in an American court.) The conclusion that this trust, clearly set up for the benefit of the whites of Macon, no longer benefits them, thus "frustrating" the affirmative purpose of the trust, causing its "uses" to "fail," must therefore rest on a conclusion, in effect one of law, that Negroes spoil a park for whites.

The only faint (and, it is submitted, illusory) hope of escape from this conclusion lies in the assertion that the

exclusion of Negroes was itself a "purpose of the trust"—that is, one of the chief objects of its establishment, one of the "uses" which has "failed." But to assert this is to assert a great absurdity, an absurdity too great to hide behind any generalities about "deference" to state courts; who would leave land in trust *for the purpose* of excluding Negroes, or "declare" such exclusion as a "use"? Georgia Code §108-106(4). It is also to impute a truly sinister design to Senator Bacon, a design altogether inconsistent with his expression of friendship for the Negro race. To call the exclusion of Negroes by Senator Bacon part of "the purpose of the trust" is to confuse the affirmative object he had in mind with a provision, incidental though of course important in his eyes, as to a collateral matter.

Confusion, but easily dispellable confusion, may be created by the fact that Bacon's will uses the word "sole. . ." See respondents' Brief in Opposition to Certiorari, p. 27. But the adjective "sole" does not denote a mode or degree of enjoyment or use. Unpacked, it says no more than that Negroes are to be excluded. It does not in any way differ in its reference from an explicit and separate provision for their exclusion, and does not make it any the less "the purpose of the trust" that the whites of Macon shall enjoy Baconsfield.

The Georgia court, in its opinion, repeatedly declares that the purpose of this trust was the furnishing of a park for Macon whites, e.g., "It is clear that the testator sought to benefit a certain group of people, white women and white children of Macon . . ." (A. 540); "the beneficiaries being "the white women, white girls, white boys, and white children of the City of Macon . . ." (A. 541); "Senator Bacon . . . selected a group of people, the white women and children of the City of Macon, to be the ob-

jects of his bounty, in providing them with a recreational area." (A. 545).

Elsewhere, the Georgia court several times speaks of the total failure of this purpose, e.g., ". . . we are of the opinion that the *sole purpose* for which the trust was created has become impossible of accomplishment . . ."; ". . . the *sole purpose* . . . had become impossible of accomplishment . . ." (A. 539, 542; emphasis supplied).

It is interesting that these passages recognize and emphasize the unitary and simple character of this trust's object; it had a "*sole purpose*." But the passages previously quoted tell us, correctly, that this "*sole purpose*" was the furnishing of a park to the whites. There is no way whatever, therefore, to justify the judgment of the Georgia court, except on the basis that, as a matter of law, the proximity of Negroes destroys the value of the park for whites, for it is only on this assumption that the "uses" of the trust may be said to have "failed." That is the certain "*hidden major premise*" of the Georgia court's holding. (It is, of course, not petitioners' assertion that this proposition was consciously present to the Georgia court's mind, p. 51 *supra*.)

It is to be observed that this is emphatically not a case in which the court was asked to give effect to a provision for reverter or for the determination of a base fee, in the event of Negroes' occupying or otherwise using property. (Cf. *Charlotte Park and Recreation Commission v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956), and the discussion *supra*, pp. 47-48.) That case can be decided when it is reached. Not even informally, not even by implication, did Senator Bacon provide for this reversion. (For full discussion of this point, and the Georgia court's admission thereon, see above, p. 43 et seq.)

It is then not Senator Bacon's will, in either sense of the word, that is being enforced. It is 1968 Georgia decisional law, and nothing else, that declares that a reversion is to be decreed when Negroes must be admitted to a place where a testator, in a will fifty-seven years old, has said they are not to go—though that testator did not himself provide for a reversion.

To sum up at this point, Georgia law provides for a resulting trust, in cases of this sort, only where the trust has "failed." Georgia Code, §108-106(4). This trust can be said to have "failed" only on one of two hypothesis:

(1) It was its "purpose"—its affirmative purpose in the sense that "failure" to attain that purpose is "failure" of the whole trust—to exclude Negroes. This is at once a sinister and an absurd interpretation, one to be rejected as soon as clearly stated. The Georgia court never espouses it; there is no indication Senator Bacon espoused it. For a state court to decree the forfeiture of property on such a premise would be to implement and support in the most drastic way a particularly noisome form of racism—and in this case to do so without one grain of support in the record for the settlor's having held such a view.

(2) It was the "purpose" of the trust, affirmatively, to furnish a park for white people, but that purpose "fails" *even though white people may still use the park*, because Negroes may also use it. Whatever words one uses to describe the evaluation of Negro presence on which this alternative must rest—nuisances, obnoxious, detriments to enjoyment—the inescapable assumed premise is that, as a matter of law, the presence of Negroes causes white enjoyment to

"fail." This is an impermissible ground under the Fourteenth Amendment.

If the Georgia court had had no alternative, under its state law, to decreeing reverter whenever *all* the particular terms of any trust could not be fulfilled, then a question of some complexity would be presented. We are spared the effort of unraveling this remedial tangle, for Georgia law very plainly provided the court below with means of escape from a holding that a park must revert, and the underlying trust be treated as "failed," merely because some Negroes may now join the whites who continue to be beneficiaries in fact as well as in law.

The Georgia law of *cy pres* is codified in two sections of the Georgia Code:

108-202. *Cy pres*.—When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will *as nearly as possible* effectuate his intention. (Emphasis supplied.)

113-815. *Charitable devise or bequest. Cy pres doctrine, application of*.—A devise or bequest to a charitable use *will be sustained and carried out* in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose *in a manner most similar* to that indicated by the testator. (Emphasis supplied.)

On their face, these statutes seem not so much to make possible as to command application of *cy pres* to just such

a situation as the one which confronted the Georgia court in this case. As far as §108-202 is concerned, it is entirely plain that continuance of the trust on a nondiscriminatory basis effectuates Senator Bacon's intention "as nearly as possible." There would be, indeed, a large variance from his intention, but that variation, however large, would be as small "as possible" under the Fourteenth Amendment. Under §113-815, the application of *cy pres* to this case would have carried out the general directive of the first clause, and operation of the park on a nondiscriminatory basis would, again, amount to its operation in the "manner most similar" possible to that which Bacon directed.

The Georgia court, in the opinion below, treats quite briefly the contention that *cy pres* should have been applied—not citing either of these statutes. Only one case, *Ford v. Thomas*, 111 Ga. 493, is cited—for the proposition that the doctrine "cannot be applied to establish a trust for an entirely different purpose from that intended by the testator"; on examination, all that case held was that insufficient effort had been exerted to fulfill the purpose the testator stated.

It is stressed in the opinion that Senator Bacon desired the exclusion of Negroes—a point conceded by all, and one only opening the question whether *cy pres* should have been applied.

Respondents, in their brief in the Georgia court, say that the "one Georgia case we find to be of significance is *Adams v. Bass*, 18 Ga. 130." That case, decided before the Civil War, voided a trust for the resettlement of Negro slaves in free states, on the ground that the particular states named by the testator would not admit them. Of this case, perhaps the best thing one can say is that it was decided before the adoption of the present Georgia

code or of the Thirteenth and Fourteenth Amendments. It represents a low point in failure to apply *cy pres*, and contravenes flagrantly the letter and the spirit of the present Georgia code.

After *Adams v. Bass*, no Georgia case has been found in which a trust was allowed to fail, when beneficiaries and trustee were still in being, and when the intended benefit could still be received, merely because the trust could not be carried out in the manner directed by the settlor, or because its benefits were extended to a larger class, without in any way diminishing the enjoyment of the intended beneficiaries.⁸ The very least one can say, therefore, is that the Georgia court was not bound by any of its precedents, by any of its statutes, or (as it concedes) by anything dispositive or even suggestive in Senator Bacon's will, to choose not to save this trust. The state court was entirely free, and indeed was forced, to make its own choice, as an agency wielding state power, between that action (the application of *cy pres*) which would have saved the trust, and that action (the one it took) which would destroy the trust and with it the petitioners' rights, as citizens of Macon, to resort to the park.

Not quoting or even citing either of the Georgia *cy pres* statutes, respondents stress that *cy pres* is an "intent-enforcing doctrine." As these Georgia statutes show, *cy pres*, at least in Georgia, could more precisely be described as an "intent-varying" doctrine, for these Georgia statutes take hold *only* where the known intent of the settlor *cannot* be fulfilled. More fundamentally, however, this case is not one to which the concept of intent-enforcement is relevant. It would be impossible for a testator, short of signing his

⁸ Respondents speak of the ease at bar as having been decided under "well-settled principles of Georgia law," Brief in Opposition to Certiorari, p. 15, but cite no cases, anywhere, to back this up.

name in blood, to indicate more clearly than Senator Bacon did his wish that this land remain forever a park: "And I conjure my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved for the uses and purposes herein indicated . . ." (A. 21). At the same time, he very clearly indeed intended that Negroes be excluded, and gave reasons for that desire—just as he gave reasons for wanting the land to remain a public park. The concept of "intent-fulfillment" is nonsense when applied to these equally clear and quite contradictory "intents." Under these circumstances where the intent of the testator must in any case be grossly violated, all the *cy pres* doctrine can do is to open to a court the *choice* as to which violation is to occur.

We have to construct the rationale necessary to explain logically the court's ruling, for the grounds it gives are little, if any, more than conclusory. But these grounds can be constructed with certainty—not in the sense that they were consciously present in the mind of the Georgia court, which petitioners do not assert,⁹ but that they are logically necessary to the holding.

It is submitted that, in deciding not to apply *cy pres* to this trust, the Georgia court necessarily decided that the racial limitation in Senator Bacon's will was of more dignity and importance than his equally or more solemn and explicit provisions for the perpetuity of this trust and for the perpetual maintenance of the park as such. This policy decision, by the court, was inescapable. For the only other person who could have decided it was Senator Bacon, and he did not decide it. The Georgia court concedes that he did not decide it (see p. 44, *supra*). The

⁹ See *supra*, p. 51, first full paragraph.

record would not support a finding that he decided it, but would, on the contrary, conclusively show that he did not decide it.

It does not avail to stress (as the Georgia court, in its brief treatment of the *cy pres* contention, stresses) that Senator Bacon very seriously desired to keep Negroes out of Baconsfield. The Georgia statutes, on their face, clearly provide for *cy pres* in the very case, and only in the very case, where the settlor's intent *cannot* be given effect. The question posed to the Georgia court, then, was not whether *cy pres* would fulfill Senator Bacon's whole intent, but whether the variation from that intent was *undesirable enough* to inhibit the use of the clearly available device of *cy pres*. The judgment of the Georgia court, under whatever view of state law taken, is therefore a judgment that forfeiture of this park and total failure of Senator Bacon's scheme is to be preferred to the admission of Negroes.

Georgia's *cy pres* statute merely opens the way to an unavoidable choice between these alternatives; neither they nor anything else in Georgia law compel the choice made. As to ordinary state law questions of this form, it goes without saying the Georgia court's choice would be final. But in this case the choice was made in a direction which clearly implies¹⁰ an estimate that racial mixture is crucially undesirable, so undesirable that the whole carefully constructed scheme for a park is not to be saved. Such a decision is wrong as a federal-law matter.

To sum up, then, this state court had first to decide whether this trust was to be declared to have "failed"; its "failure," if any, consisted in nothing more or less than the admission of Negroes to enjoy the park along with the intended beneficiaries, *who still could themselves fully enjoy*

¹⁰ But see *supra*, p. 51, first full paragraph.

it. Secondly, having (as petitioners contend, impermissibly) chosen to declare "failure," the Georgia court chose to reject the *cy pres* alternative clearly tendered it, thereby inevitably espousing the proposition that enjoyment of a park by whites *in the absence* of Negroes so fundamentally differs from enjoyment of a park by whites *in the presence* of Negroes as to go not to the question of "exact manner" (Ga. Code §108-202) or "particular mode" (Ga. Code §113-815), but rather to the essence. Since the essence of enjoyment is enjoyment, this must in turn imply that the presence of Negroes, as a matter of law, critically impairs white enjoyment. The ground for declaring "failure" of the trust, and the ground for rejecting *cy pres*, came down then (as one would expect) to much the same ground—a ground profoundly insulting to Negroes, and hence impermissible under the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

C. Confronted with the Unavoidable Necessity of Choosing Between Senator Bacon's Two Contradictory Wishes, the Georgia Court Impermissibly Chose to Give Effect to That Part of His Will Which Was Incurably Tainted by Its Having Been Drawn Under Georgia Code §69-504. This Choice Constituted a Preference of the Unconstitutional Over the Constitutionally Unobjectionable Alternative.

As Mr. Justice White maintained in his concurring opinion in an earlier decision in this case, *Evans v. Newton*, 382 U.S. 296, 302 (1966), ". . . the racial condition in the trust . . . is *incurably tainted* by discriminatory state legislation validating such a condition under state law." 382 U.S. at 305. (Emphasis supplied.) Cf. 382 U.S. at 300, fn. 3, where the majority discusses the same theory. This incurable taint goes not only to the availability of the tainted provision for producing the result it primarily aims at, but also makes it improper for the Georgia court, ineluctably

faced (as we have shown) with making its own choice between the tainted and the untainted provisions in Bacon's will, to choose to give strikingly preferential effect to the tainted provision, by treating it as tantamount to a direction that the trust be terminated on its violation. The provision "incurably tainted" ought to be given no effect whatever; certainly it should not be enlarged by construction into a direction for termination.

Georgia Code §69-504, passed a few years before Senator Bacon drew his will, reads as follows:

Ga. Code §69-504 (1933) (Acts, 1905, p. 117):

Gifts for public parks or pleasure grounds:—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

It is submitted that Mr. Justice White correctly held that "This case must . . . be viewed as one where the state has forbidden all private discrimination except racial discrimi-

nation." 382 U.S. at 311. The background of §69-505 makes clear its functioning as an affirmative facilitation of racial discrimination.

The Georgia Code of 1895, the first relevant item in that background, names no category including parks as a subject of charitable trusts. The 1895 Code enumeration (not materially different from present Ga. Code §108-203) is as follows:

§4008. (3157.) *Subjects of charity.* The following subjects are proper matters of charity for the jurisdiction of equity:

1. The relief of aged, impotent, diseased or poor people.
2. Every educational purpose.
3. Provisions for religious instruction or worship.
4. For the construction or repair of public works, or highways, or other public conveniences.
5. The promotion of any craft or persons engaging therein.
6. For the redemption or relief of prisoners or captives.
7. For the improvement or repair of burying-grounds or tombstones.
8. Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization.

"The promotion of human civilization" would seem a pretentious statement of the objective of a park; for a state court to hold that segregating a park constitutes such a promotion of civilization would violate the Fourteenth Amendment. No "construction or repair" is the principal

subject of this trust. No Georgia court ever held any part of this section applicable to a park, in all the years before §69-504 became law. This really is enough to establish the entire uncertainty, in the Georgia law, before §69-504, of the validity of a trust for a racially discriminatory park.

Authoritative summarization of the general law of trusts for parks confirms this view, e.g.,:

4. *Other Public Purposes.*—Other public purposes not in the ordinary sense *benevolent*, may be valid charities, since they are either expressly mentioned by the statute, or are within its plain intent. All of these purposes tend to benefit the public, either of the entire country or of some particular district, or to lighten the public burdens for defraying the necessary expenses of local administration which rest upon the inhabitants of a designated region. 4 Pomeroy, *Equity* §1024.

There being no Georgia cases, this synthesis of the "common law" elsewhere is significant. The park, where held a public charity, is so held because it benefits the *whole* public, or because its receipt free of charge, lightens the expense of the performance of a *governmental function*. The upholding of racially exclusive parks, as objects of public charity, would be a contradiction in terms on the first of these theories, and the second of them so deeply implicates the charitable trust in the governmental plan as to make its enforcement plainly obnoxious to the Fourteenth Amendment.

Thus, as one would confidently expect when so carefully drawn a statute as §69-504 is put through the state legislature, the prior Georgia law was at least doubtful. It is against the parts of that law that were not doubtful that §69-504, and its operation, are to be judged. A very clear

role can be assigned this statute when one advert's to the law of parks in Georgia, as plainly seen in the old Georgia cases.

Apparently no Georgia case had dealt with a charity involving a park. But plenty of Georgia cases had dealt with parks, treating them, as the common law traditionally does, as lands "dedicated to the public," the members of the public, as such, having easements of enjoyment in them.

The leading case, never lost sight of in later opinions, is *Mayor and Council of the City of Macon v. Franklin*, 12 Ga. 239 (1852). In a luminous opinion, Judge Nisbet learnedly reviews the doctrine of "dedication," concluding:

Dedications of lands for charitable and religious purposes, and for public highways, are valid without any grantee to hold the fee, and the principle upon which they are sustained, sustains dedications of streets, squares and commons. *City of Cincinnati vs. The Lessee of White*, 6 Peters' R. 435, 436. *Beatty vs. Kurts*, 2 Peters' R. 256. *Town of Paulett vs. Clark*, 9 Cranch, 292. *Lade vs. Shepherd*, 2 Stra. 2004. 12 Wheat. 582.

* * * * *

That commons and squares are subjects of dedication and under the principles which govern streets and highways, see the great case of *The City of Cincinnati vs. White's Lessees*, 6 Peters, 431. *Watertown vs. Cohen*, 4 Paige R. 510. *State vs. Wilkinson*, 2 Vermont R. 480. *Pearsoll vs. Post*, 20 Wend. 111. 22 Wend. 425. (12 Ga. at 244-45.)

The holding of the case was that the city of Macon might not sell for a private use land which it had itself "dedicated" to the public as a public square or common.

Other Georgia cases treat public parks and analogous tracts as "dedicated," with reciprocal public easements. *County of Gordon v. Mayor of Calhoun*, 128 Ga. 781 (1907), decided a few years after the passage of §69-504, shows that the Georgia court, which had apparently never dealt with a park as the subject of a charitable trust, thoroughly knew the "common," with its accompanying public easements, as the legal device by which parks were maintained as such. See also *Pettit v. Mayor and Council of Macon*, 95 Ga. 645 (1894).

There was, however, one difficulty, not much felt, perhaps, in 1852, the year of *Macon v. Franklin*, but later a cloud that could have been seen on the horizon. The "dedication" that creates a public park is *to the public as a whole*. Georgia law was of one voice on this, *Ford v. Harris*, 95 Ga. 97, 100 (1894); *East Atlanta Land Co. v. Mowrer*, 138 Ga. 380, 388 (1912); *Western Union Telegraph Co. v. Georgia Railroad and Banking Co.*, 227 F. 276 (S.D. Ga. 1915). The concept of "dedication" left no room for selecting parts of the "public" to enjoy the public easement; there was no middle ground, conceptually, between the public use, comprehensive as to the public, and the private easement, an unsatisfactory legal basis for operating a public park.

The expectable trouble developed, not as to parks, but as to the analogous case of the cemetery. In *Brown v. Gunn*, 75 Ga. 441 (1885), "persons of color" claimed, as members of the public, the right to be buried or to bury their dead in a cemetery they contended had been "dedicated" to the public. The court held, on the facts, that no "dedication" had taken place, but there was no suggestion, in the opinion, that such "dedication" could conceivably, as a matter of law, have been to the white public only.

This, then, was the background of §69-504:

1. No provision in the purportedly exhaustive Code enumeration authorized the setting up of a charitable trust for a park.
2. The "common law" of the subject, outside Georgia, generally rested the inclusion of parks in the subject-matter of charitable trusts on two grounds, one of which was incompatible with racial exclusion and the other of which so deeply involved the interests of government in the operation of the park as to make it likely that "state action" would be found.
3. No Georgia case had ever held a park, racially restricted or not, to be the proper subject of a charitable trust.
4. Georgia's public parks were conceived as "dedicated" commons, with corresponding public easements. This concept, thoroughly familiar to the Georgia court, had no room for restriction to parts of the public. Thus, the only sure and well-travelled way of giving one's land for a public park—"dedicating" it to the public—contained no means of enforcing a racial restriction.
5. In at least one case that got as far as the state's highest court, Negroes, asserting the very claim so irresistibly suggested by all the foregoing, had sought to enjoy their easement in "dedicated" property, and had been turned away only on a narrow finding of fact.

Petitioners urge that the situation defined by these numbered points was the one §69-504 was designed to meet, because it is the very situation to which it appears to address itself. It reads and sounds like remedial legislation, and if it was, this was what it was designed to remedy. In any

case, this is the legal background against which it became law.

Against that background §69-504 is no longer a puzzle. That section supplies the one thing needful—permission to give land as a park with racial restrictions—and it supplies that alone. Before it was passed, anybody who wanted to give his land as a park for the whole public could “dedicate” it, in the time-honored way. *The single practical change* the section made was that he now could restrict his gift racially—not in general or in any way he wished, but only racially.

The 1905 statute, then, by the leave and only by the leave of which this racially restrictive term was inserted in Senator Bacon's will, was a specifically hostile state act against the colored race, authorizing clearly, for the first time in Georgia law, their exclusion from parks otherwise public. That was its minimum effect. Here we have what one would never have expected to encounter in such explicit clarity, literally that very thing which Mr. Justice Stewart, concurring in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 at 727 (1961), found by inference: “... This legislative enactment . . . authorizing discrimination based exclusively on color.” Here is no mere general declaration of a right to discriminate on any grounds, but rather on the one hand the lending of Georgia's law's sanction, for the first time so far as one can tell, to charitable trusts for public parks, with the proviso that racial discrimination and that discrimination alone, is to be permitted—and, on the other hand, the plugging of a loophole that had made racial discrimination difficult in the law of public parks as it actually existed in Georgia.

This is the minimum effect of this statute. But is it not also clear that, against this background, any citizen must see that the state is at least suggesting discrimination? Is

this not the necessary effect of such a statute? If it were merely declaratory of one consequence of a general capacity in testators to discriminate in any manner, must it not for that very reason function as a mark of the state's special interest in this form of discrimination? Cf. *Reitman v. Mulkey*, 387 U.S. 369 (1967). Against the legal backdrop that actually existed, on the other hand, it must surely signal to all a state policy of fostering and favoring segregation, evidenced in the most convincing manner by solicitude to make such segregation possible against all previous objections of a technical cast. As this Court held in *Anderson v. Martin*, 375 U.S. 399, 402 (1964), striking down a law which encouraged racial discrimination at the polls, "placing of the power of the State behind a racial classification that induces racial prejudice" violates the Equal Protection Clause.

Finally, a careful lawyer, seeing in §69-504 his only reliable Georgia authority for setting up a trust for a park, might well be afraid to count on a later time's reading of a statute so clearly racial in its thrust. The verbal problem he would have would not be that of the meaning of the word "may." The problem would be whether the act which, under the statute, the testator "may" perform is (1) the conveyance of land for a park with or without any of the conditions enumerated; or (2) the conveyance of the land together with the one he chooses from among those conditions. Stranger feats of statutory construction have been performed than a court's reading this language to have the latter meaning.

The general point is not, however, the only reliance in this case. What Senator Bacon actually did, in the first instance, was to leave his land in trust as a park for the *white women and children* of Macon (R. 19). Now §69-504, on its face and with no ambiguity whatever, fails to au-

thorize a gift to women and children on an unsegregated basis. It authorizes a gift for white women and children only, or for colored women and children only, or for women and children of any other race only, but none for women and children of all races together. Had Senator Bacon, therefore, wished to leave his park for all women and children, he would have had to conclude that he could not lawfully do so under §69-504, and that if he tried to do so on an alternative "common law" theory he would be met not only by all the difficulties above discussed, but also by the powerful argument that this carefully drawn statute, enumerating permitted discriminations, excluded others by implication. The Board of Managers, to be sure, later opened the park to all whites. But Bacon could not have known they would, and authorized them not to. Under §69-504, he could not have authorized them to include all women and children.

The actual effect of all this on Senator Bacon's mind is not important. *Peterson v. City of Greenville*, 373 U.S. 244 (1963). What is important is that the state of Georgia, in passing this statute:

- (1) Supplied the specific thing its law had lacked—a clear means for a private person's giving his land for a "public" park on racially discriminatory terms.
- (2) In the context of prior law, signalled the State's anxious interest in seeing racial discrimination (rather than mere general "freedom of choice") authorized and practiced.
- (3) Engendered legal doubt that any trust for a park would be valid without racial discrimination, and, unless its readable text and normal implications be ignored, made flatly unlawful the non-racist rule of admission—"women and children only"—corresponding

to the racist rule—"white women and children only"—actually adopted in this case, thus in effect commanding segregation by race if a "women and children" park was wanted.

It would seem clear that such a statute does "incurably taint" a discriminatory provision drawn under its authority. The only question that remains, in the present posture of the case, is whether the "incurable taint" really is incurable, or whether a miraculous recovery has occurred. Is the racial condition "tainted" only as far as its direct affirmative thrust goes, while the same provision is untainted when a court seeks to use it as the only ground for destroying this public park? The question is a new one, but it is a question not of state law but of the effect of a federal constitutional taint. Petitioners submit that that which is "incurably tainted" by constitutional infirmity ought not to be usable for *any* purpose, on the obvious ground that *any* use of such a provision in some way gives practical effect to that which ought to be without effect. Cf. *Mapp v. Ohio*, 367 U.S. 643 (1961).

If this tainted condition drops out of the will, then reversion is clearly impossible.

D. At Least Under the Highly Special Circumstances of This Case, the Provision for Racial Discrimination in Baconsfield Ought, as a Matter of Federal Law, Under the Fourteenth Amendment, to Be Treated as Absolutely Void. If This Is Correct, Then Federal Law Commands That This Trust Be Continued and That the City Continue as Trustee, for It Is Clear That Without the Racially Discriminatory Language Georgia Law Compels That Result. Similarly, Federal Law Commands That a Public Park "Dedicated" to the White Public Be "Dedicated" to the Negro Public as Well.

Senator Bacon's will, as we have just seen, was drawn under the then recently-enacted authority of the present Georgia Code §69-504, quoted *supra*, p. 61.

The will looked backward, then, to recently enacted state legislation for its indispensable authorization. (Compare the argument developed in C, *supra*.) Even more important, so far as the argument about to be developed is concerned, on its face it clearly looked *forward* to further and quite centrally important official connection with state power, for it provided that the city of Macon should be trustee and that the City Council should appoint the Board of Managers for the park. When the city of Macon accepted this position, the racially discriminatory provisions in the will became tantamount to city ordinances—part of the normative material promulgated and espoused by the City with respect to the conduct of this public park.¹¹ Senator Bacon, an eminent

¹¹ No special weight is intended to be placed on the word "ordinance." The crucial point is that the "no-Negro" rule became, by the City's acceptance of the trust, a rule which the City (or the Board of Managers appointed by the City, or both) had accepted and had the duty of enforcing. It can hardly make any difference that the City, by accepting the trust, had in some sense bound itself to keep this rule in force. Whatever the rule's claim to permanency, it was certainly a part of the publicly espoused rule-material governing this city park, and had become that by the City's action as well as by the action of Senator Bacon. Cf. Respondents' Brief in Opposition to Certiorari, pp. 31-32.

lawyer, knew and clearly wished that this part of his will would speedily gain this official status as part of the City's rules with respect to the operation of its park. It would seem quite artificial to treat such provisions at any stage in their rapid and intended progress from explicit statutory sanction toward the status of being, in effect, ordinances, in a manner different from that in which one would treat ordinances themselves. Indeed, their character as "mere" expressions of Bacon's will was merged in their character as quasi-ordinances on the day the city of Macon accepted the trust.

This point is driven all the way home by Georgia Code §69-505, in force when Bacon drew his will, when he died, when the City accepted the trust, and during the whole life of Baconsfield as an all-white park:

69-505. Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, *and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive use and enjoyment thereof.* (Emphasis added).

How is it possible, in the light of this language, to see these provisions as not having the character, intended and achieved, of public law? Under this statute it is the *conveyance itself* that gives the restrictions their public law character.

But is it not clear that a city ordinance, commanding exclusion of a race from a large park, would simply be stricken? Could a Georgia court be permitted thereafter to close the park and give the property back to the former owners, on the ground that the known or declared "purpose" of the laws about parks was the provision of parks on a discriminatory basis? See *Griffin v. County School Board*, 377 U.S. 218 (1964). Would not any public-law material declaring such a "purpose" have to be similarly stricken?

It is submitted, therefore, first, that Senator Bacon's directions about the discriminatory conduct of Baconsfield were intended by him to achieve very quickly the status of city ordinances, and they did in fact achieve and hold that status, under §69-505 and by virtue of the City's becoming trustee. Secondly, it is submitted that their status in this regard makes it suitable to treat them as unconstitutional city ordinances or other public-law rules are always treated —i.e., as nullities. If they are nullities, then there is not and never was any colorable ground for termination of the trust or for the City's resignation. When they are stricken, what remains is a public park.

It is worth pointing out that there lurks in this argument no problem about the retroactivity of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its sequel cases, outlawing segregation even where "separate but equal" facilities were provided. The part of §69-504 which authorized racial exclusion, since it obviously made possible the creation of city parks without provision for separate equal facilities, was unconstitutional on its face even under *Plessy v. Ferguson*, 163 U.S. 537 (1896). The exclusion of Negroes from Baconsfield, a public park run by the City, was unconstitutional even under *Plessy v. Ferguson, supra*, unless separate but equal facilities were in fact provided; this

record shows none, and it can hardly be that the burden rests on those excluded from one city park to show *affirmatively* that no "equal" park is furnished. Senator Bacon's testamentary provision for exclusion of Negroes rested, then, on an unconstitutional statute, and both contemplated and induced an unconstitutional action (at least so far as this record shows) by Macon—under 1910 standards as well as under 1969 standards.¹² It would seem quite artificial not to treat a provision so sandwiched as though it were itself unconstitutional, to be stricken as a matter of federal law, as one would strike out the part of §69-504 on which it rested, and the discrimination it contemplated and created.

This conclusion, in a deep but true sense, may be seen to rest on the philosophy of *Marsh v. Alabama*, 326 U.S. 501 (1946). That case held that, where a person opens his or its property to the public, or to a governmental use, there attaches an obligation to respond to the norms of the Constitution, as these regulate governmental action. It would be harmonious with this philosophy to hold that as soon as a testator, like Bacon, publishes a will giving his property to serve as a public park, and even goes so far as to make the City of Macon his trustee for this purpose, so as to effect the incorporation of his rules for running the park into the City's own fabric of law, then these directions, if repugnant to the Constitution, are to be treated as official rules repugnant to the Constitution normally are treated—by looking on them as null and void. A constitution which forces color-blindness on the city ought to be held to force

¹² In any case, the provision, and the City's consequent §69-505 powers, were evidently unconstitutional long before this litigation started. *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957). Besides, the public-law character of the racial provision, and its consequent *amenability* to such constitutional norms as might develop, were fixed from the beginning.

color-blindness on one who both proposes to use and succeeds in using the city as agent of his will.

More in fairness to Senator Bacon's memory than in strict relevance to this point, it should again be emphasized that there is no reason whatever for thinking that Senator Bacon would have disagreed with the indicated result, as matters now stand. We simply have no way of knowing whether, if he had been told that this park could not be operated at all on a discriminatory basis, he would have chosen that it be operated for all. Treating his racial directions as *pro non scripto*, as the nullities they would unquestionably be if considered as sections in a city code, may, for all we know, do far less violence to what his wish would have been than is done by the Georgia court in awarding Baconsfield to his heirs, for such fate as marketable city property may have—including likely occupancy, and even ownership, by Negroes. The choice to overthrow his scheme *in toto* is not one that can be justified by respect for the wishes of a dead man; his choice, among the choices now open, is not knowable or even probably inferable. (For fuller discussion, see *supra* at pp. 43-46.) The choice is solely that of the 1968 Georgia court. And it is submitted that as a matter of federal law that court ought to be held to treating the racial exclusionary provisions as nullities.

The underlying assumption, in the very similar case of *Commonwealth of Pennsylvania v. Brown*, 392 F.2d 120 (3rd Cir. 1968), cert. den. 391 U.S. 921 (1968), involving the Girard College Trust, seems clearly to be that the word "white," in a will turning property over to the public for a public use, is to be treated as a nullity, as a matter of federal constitutional law. A judgment of affirmance in the case now at bar would have the absurd result of inviting a suit by the Girard heirs, or as many as could be found, for a reversion. Cf. *Sweet Briar Institute v. Button*, 280

F. Supp. 312 (W.D. Va. 1967), rev'd *per curiam*, 387 U.S. 423, decision on the merits, 280 F. Supp. 312 (1967).

Another and rather closely parallel route to considering this racially restrictive language as a nullity is to be found in the fact that this park, having unquestionably been "dedicated" to the white public under *Georgia* law, must, as a result of the *federal* command of equality, be taken to have been "dedicated" to the Negro public as well.

The regular way of creating a public park in Georgia, prior to the enactment of Georgia Code §69-504, was by dedication to the public, with reciprocal public easements. See *Macon v. Franklin*, 12 Ga. 239, and the summary on this point in this Court's opinion in this same case, *Evans v. Newton*, 382 U.S. 296, 300, n. 3 (1966). (Cf. also point C, *supra*.)

Section 69-504, enacted in 1905, while permitting racial discrimination, expressly retains the concept of "dedication":

Gifts for public parks or pleasure grounds.—Any person may by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance *dedicated in perpetuity to the public use* as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by

such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts 1905, p. 117.) (Emphasis added.)¹³

Now, when this park passed into the trusteeship of the city of Macon, thereupon it became the fixed right of all Negro citizens of Macon to be treated, with respect to their rights in the park, just as the white citizens were treated. This record shows no "separate but equal" facilities, in 1914 or at any other time. The enjoyment of easements by whites, but not by Negroes, in a park under city trusteeship, was therefore unconstitutional even under *Plessy v. Ferguson*. (See *supra*, pp. 73-74.) It can make no difference that Negroes were not positioned in knowledge or in power to enjoy their rights.

But even if it be thought that this arrangement was not unconstitutional under *Plessy*, and even if (contrary to the general rule) *Brown v. Board of Education, supra*, and cases following are not taken as declaring the rule that had been correct all along, but only of force prospectively, it is nevertheless indisputable that, at some time years prior to this litigation's commencement, it became clear that as a matter of federal constitutional law, the Negro citizens of Macon must possess, in respect of this city-trusted park, just exactly the same rights, intangible as well as tangible, as the white citizens of Macon.¹⁴ Since it cannot be contested, under §69-504, that the park has been through all

¹³ It is hard indeed to see how, in the face of this language respondents can contend that this park was not "dedicated" to the white public. But see Brief in Opposition to Certiorari, p. 34.

¹⁴ See *Holmes v. Atlanta*, 350 U.S. 879 (1955); *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957).

these times "dedicated" to the use of the *whites*, it must equally, by operation of federal law, be taken to be "dedicated" to the use of *blacks*—not because Georgia law ordered that result (for it did not), not because Senator Bacon intended that result (for he did not), but because federal law, *in commanding equality*, necessarily commanded that result.

Since the point of "dedication" was raised in the assignments of error in the Georgia Supreme Court, and since it was fully briefed there, it is surprising to find that it is not dealt with in that court's opinion. There is a brief reference in the opinion to the Order and decree of the Bibb County Court; the passage referred to is thus the only place one can look for a reasoned statement of the Georgia court's grounds for rejecting the "dedication" argument:

It is clear that the testator sought to benefit [the whites] and the language of the will clearly indicates that the limitation to the class of persons was an essential and indispensable part of the testator's plan for Baconsfield. There has been no dedication of Baconsfield as a park for the use of the general public.

It is petitioners' contention, as just set out, that this conclusion is wrong, not as a matter of state law, but as a matter of federal law, for the precise reason that it takes no account of the fact that federal law commanded *equal* rights—whether as holders of easements, or as beneficiaries of "dedication"—for Negroes. As a net integral sum, adding the effect of Bacon's will, under Georgia law, to the effect of federal law on the situation thus created, Baconsfield must be held "dedicated" to all.

If Baconsfield, then, by the joint operation of Georgia and federal law, was "dedicated" to use as a park by whites

and by non-whites, then it seems plain that under Georgia law that dedication is not retractable. Granting *arguendo* that the purpose of Senator Bacon's *trust* has failed (but see above, point B), the *uses* to which the park is "dedicated" have not failed.

Some confusion may be created by the juxtaposition of the concepts of "dedication" and "trust." These concepts are not at war under Georgia law—or, for that matter, under Anglo-American law in general. Section 69-504, just quoted, makes it plain that Georgia law sees no difficulty in lands being *both* under trusteeship *and* dedicated to the public. For the "appropriate conveyance" under §69-504 may be in fee simple *or* in trust, but whichever of these sorts of conveyances is chosen, the lands are to be "dedicated in perpetuity to the public use . . ." There is no difficulty about this double aspect of the creation of a park. The legal title to land may be held by a trustee, and the duties of his (or its) trusteeship may include, for example, maintenance, while simultaneously the land may be "dedicated" to the public, with public easements upon it. These arrangements are complementary and not contradictory. Somebody, whether or not a trustee, always holds underlying title to land over which easements run.

The holding, then, that Baconsfield was not to be treated as "dedicated" to the public, with all that must imply under Georgia law, rests essentially on a wrong reading or disregard of the federal command of equality. Such a holding obviously cannot be allowed to stand.

The thoroughness of the "dedication" in this case is emphasized (if emphasis be needed) by reference to the public subsidies and aids this park has received. The record abounds with details of maintenance, tax exemption, and even substantial city and federal aid. State power com-

pelled and solicited these aids, and can have done so only on the theory that the park was "dedicated" as a park. It would be anomalous in the extreme for that same state power, acting through a different agency, now to be allowed to say that this park was not, after all, "dedicated" to a public use.¹⁵ And if it was dedicated to a public use, it was necessarily dedicated to use by all races, under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Georgia ought to be reversed.

Respectfully submitted,

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¹⁵ See *supra*, pp. 49-50.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 1106.

REVEREND E. S. EVANS, et al.,
Petitioners,

v.

GUYTON G. ABNEY, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia.

BRIEF FOR RESPONDENTS.

QUESTION PRESENTED

Where a testator devises land in trust with the direction that said land be used as a park for the white persons,¹ and

¹ The property was devised in trust "for the sole . . . use of the white women, white girls, white boys, and white children of the City of Macon . . ." The Board of Managers in which management of the park was vested was given the authority to admit "the white men of the City of Macon and white persons of other communities."

only for the white persons, of the community, and states as the reason for the racial limitation his positive disapproval of the two races using recreation grounds together and in common, and where it is subsequently held by the United States Supreme Court that the property cannot continue to be used as a park for white persons only, are Negro citizens of the community denied any Federal constitutional rights by a judgment of a state court recognizing that (as a matter of state law and of the interpretation of the particular bill under consideration) the trust has failed, and the property has reverted to the heirs of the testator?

STATEMENT OF THE CASE.

Respondents incorporate by reference the statement of the case contained in the opinion of the Supreme Court of Georgia (A. 537). Generally speaking, and except as hereinafter commented upon, petitioners have made a relatively accurate summary of most of the evidence which is in the record. However, as far as the issues are concerned, we view the great bulk of material in the record as being largely, if not entirely, irrelevant. This is so because the disposition of this case in the Georgia courts was controlled by the clear and unambiguous terms of the will of A. O. Bacon interpreted in the light of well-settled principles of Georgia law.

Petitioners state at page 5 of their brief that the Baconsfield property was "left to the City of Macon." Since petitioners have, throughout this litigation, tended to overemphasize and exaggerate the role of the City, it should be noted that the property was not devised to the City of Macon outright, but instead the City's interest in the property was as the passive title holder, and the use of the property was subject to certain specific conditions (as well as the continuing control of the Board of Managers).

Petitioners are in error when they state on page 7 that the motion of respondents in Bibb Superior Court asked that court to "rule that Senator Bacon's trust had become unenforceable, and that the Baconsfield property had reverted . . ." That the trust had become unenforceable had already been recognized by the Georgia Supreme Court and respondents' motion for summary judgment took note of this:

"On January 17, 1966, Bacon's trust became unenforceable and the funds held for its support reverted

at that time into Bacon's estate by operation of law. On March 14, 1966, the Georgia Supreme Court recognized that this had occurred saying, 'We are of the opinion that the sole purpose for which this trust was created has been terminated.' This judgment declaring what had transpired in regard to the title is now the law of the case. It remains only for this court at this time to give effect to said reversion of title.'" Respondents' Motion for Summary Judgment, paragraph 2 (A. 98).

The "secondary contentions" which the Georgia Supreme Court directed Bibb Superior Court to consider, were those contentions resulting from the decision that the Baconsfield property could not be used in accordance with the provisions of Bacon's will, that the trust had failed and the property had reverted into Bacon's estate. The Georgia Supreme Court having ruled that the trust had failed and the property had reverted, the only real question before Bibb Superior Court involved a determination as to the individuals in whom title had vested by operation of law.

The Will.

In view of the fundamental importance of Bacon's will, those passages from Items IX and X which are controlling are quoted herewith:

" . . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions of every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white

children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers herein-after provided for; the said property **under no circumstances**, or by any authority whatsoever, to be sold or alienated or disposed of, **or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized.** For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. **The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to exclude at any time any person or persons of either sex, who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board**

their presence in said grounds inconsistent with or prejudicial to proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement, and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield (more particular description of property omitted), but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified . . . ”

“ . . . I take occasion to say that in limiting the use and enjoyment of the property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and

regard, while for some of them I have sincere personal affection.

"I AM HOWEVER, WITHOUT HESITATION IN THE OPINION THAT IN THEIR SOCIAL RELATONS THE TWO RACES SHOULD BE FOREVER SEPARATE AND THAT THEY SHOULD NOT HAVE PLEASURE OR RECREATION GROUNDS TO BE USED OR ENJOYED, TOGETHER AND IN COMMON. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified by my gratitude to and love for the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December, 1884, and Augustus Octavius Bacon, Jr., who died on the 27th day of the same year. **And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated. . . ."**

" . . . If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the Charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed by conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their Charter to hold in trust for the

purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation . . .”

“. . . As there will be no one of my descendants who now bears my name either by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, **I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community** of which they once formed a happy part . . .” (A. 19-25). (Emphasis supplied.)

The 1920 Deed.

The statement on page 13 that “the City of Macon thus paid a total of \$41,625.00 to the trustees under Bacon’s will in order to acquire Baconsfield” is inaccurate. The City of Macon’s limited interest in the Baconsfield property was acquired by virtue of the provisions of Bacon’s will, and not because of the 1920 deed. Under the terms of Bacon’s will, the park was not to come into being until the deaths of Bacon’s wife and two children. However, the trustees and Bacon’s sole surviving daughter were apparently of the opinion that it would be desirable to proceed with an earlier development of Baconsfield than anticipated by Bacon’s will. Therefore, the trustees advised the City of Macon that they would permit the City to take possession of Baconsfield prior to the death of Bacon’s surviving daughter provided the City would agree to pay an annual rental during her lifetime (A. 406). Thus the sole purpose of the deed of February 4, 1920 was to permit the development of Baconsfield as a park prior to the death of Bacon’s surviving daughter (who had a beneficial life estate in the property).

City Activity.

On page 14, petitioners state that the Superintendent of Parks of the City of Macon "exercised general supervision over Baconsfield for many years." This is not true. Baconsfield was "supervised" and operated by the Board of Managers which Bacon provided for in his will:

"The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same . . ." (A. 19).

The Board of Managers of Baconsfield functioned entirely independent of the City and it always exercised to the fullest those powers granted under Bacon's will. In none of its duties was the Board made answerable to the City; nor did the City, as Trustee, have the right to remove any member of the Board.

That the Board, and not the City, operated the park is evidenced by the minutes of the Board of Managers from 1936 to 1964. (See Intervenors' Exhibits "A" and "B", A. 246 et seq.) These minutes which take up approximately 150 pages and summarize action taken at some 53 separate meetings during the period covered show that the Board of Managers dealt with the minutest details of the operation of the park. Furthermore, the Board spent substantial sums of money in connection with the operation of the park, this money having been derived from rental property located in the commercial area of Bacon's property (and not from public revenues). According to financial statements attached to the minutes of the Board, the Board spent approximately \$95,000.00 in connection with the operation of the Park. This money was used to purchase such things as fertilizer, flowers, shrubbery and equipment. (See, e. g., Treasurer's State-

ment, A. 284, and Treasurer's Statement, A. 300.) In addition, the Board used its funds for various capital expenditures (e. g., fill work, paving, sprinkler system) (A. 136).

The Board also compensated Mr. T. Cleveland James for his services in the maintenance and upkeep of Baconsfield. Initially he was furnished a home, and when he vacated the house in 1947 the Board voted to pay Mr. James \$50.00 per month for six months with the right to "renew same for similar periods" (A. 290). The Board also made other payments to Mr. James from time to time. (See, e. g., A. 317, 326 and 343.)

Petitioners seem to try to create the impression that governmental units have constructed numerous physical improvements on the park area. That this is not so is illustrated by the aerial photographs included in the record (A. 362-374). From these it may be seen that Baconsfield is largely a matter of trees, shrubbery and grass, with only one real structure upon it, to-wit, the Woman's Clubhouse (which itself comprises a very small portion of the park area).

Petitioners have also greatly overemphasized the role of the City in the development of Basconsfield, especially when they attempt to convey the idea that City funds have been used to greatly enhance the value of the property. The activities of the City in assisting in the upkeep of the park, while beneficial, did little to increase the intrinsic value of the land. Also, it should be remembered that during this period of time a substantial number of taxpayers were entitled to use the park.

The pool which was constructed in 1948 in the commercial area was operated by the City pursuant to the terms of a lease agreement with the Board of Managers as lessor. Under the terms of the agreement, the Board

could terminate the lease at will at two-year intervals, or by giving notice of a breach of any one of a number of stated conditions (See copy of lease attached to Amendment to Motion for Summary Judgment as Exhibit "D", A. 384). The relationship between the City of Macon and the Board of Managers was that of lessor and lessee. A fundamental element of such a relationship is that when the lease expires, or is terminated, any improvements that might have been made to the land will remain as a part of the land, and the lessee has no further rights or interest in either the land or the improvements.

We would point out as a matter of information that the swimming pool has not been open since 1964 and the photographs in the record (A. 494-500) show that the pool is no longer in serviceable condition.

We see no particular need to comment further on the statement of facts, except, perhaps to note once again that petitioners' "history" of Baconsfield Park had no bearing on the issues before the Georgia court.

SUMMARY OF ARGUMENT.

The decision of the Georgia Supreme Court involved nothing more than the construction of a Georgia will in accordance with well-settled principles of Georgia law, and no rights guaranteed petitioners by the Fourteenth Amendment, or any other provision of the Constitution, have been denied.

When A. O. Bacon devised his farm, "Baconsfield", to the City of Macon, in trust, he clearly provided that his property was to be used as a park **only** for the "white women . . . and white children of the City of Macon. . . ."² In limiting the use of the property to white persons, Bacon was not motivated by any feeling of hostility toward colored persons, nor was he necessarily prompted by a desire to be charitable only to persons of his own race. Instead, it was that as a matter of personal social philosophy Bacon was of the firm conviction that, "the two races should be forever separate and, . . . should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

Some fifty years after the probate of Bacon's will, this Court, in **Evans v. Newton**, 382 U. S. 296 (1966), ruled that Bacon's property could no longer continue to be used as a park for white persons only. Upon remand of the case to the Georgia Supreme Court, it then became the duty of that court to consider, and construe, Bacon's will in the light of the decision of this Court.

The Georgia court had before it two basic "facts", *viz.*: (1) Bacon's clear expression of intention that he wanted his property used as a park only for white persons, and that he was opposed to his property being used as a park on an integrated basis and, (2) this Court's

² See Footnote 1.

ruling that the property could not continue to be used as a park if it were not operated on an integrated basis. The purpose for which the trust had been established (to wit, a park for the **sole** use of the "white women . . . and white children of the City of Macon . . .") had obviously become impossible of further enforcement. Furthermore, that the use of Bacon's property for an antegrated park would be directly contrary to Bacon's clearly expressed intention was a **fact** which the Georgia court had to accept. And it was a fact totally apart from the wisdom, or present acceptability, of Bacon's social philosophy; for the Georgia court was constrained to consider, not what it might want, but rather only what Bacon specifically said he wanted. Under Georgia law, everywhere accepted in the United States, property devised in trust for a charitable use cannot be diverted from that use to one not intended or authorized by the testator, and *a fortiori*, it cannot be devoted to a use of which the testator has expressly stated he disapproves. Thus, as a matter of basic Georgia law, the court had to recognize that the purpose for which the trust had been established had become impossible of accomplishment, that the trust had failed, and that the property had reverted into Bacon's estate by operation of law.

In construing Bacon's will, it was incumbent upon the Georgia court to construe the will as a whole, and to consider all parts and provisions thereof, including those provisions which limited the use of Bacon's property to white persons. Contrary to the contention of petitioners, under no theory could the court have considered any provision of the will as being a "nullity". If a charitable trust fails because an indispensable provision of the trust is deemed to be unenforceable, the result is not an ipso facto elimination of that provision from the will, but instead it then becomes the duty of the court to decide whether under the circumstances then existing *cy pres*

can, or cannot, be applied. Under no circumstances can the testator's intention simply be disregarded or ignored.

The Georgia court was correct in not applying *cy pres*, for this is an intent-enforcing doctrine and it can be applied only for the purpose of carrying out what probably would have been in accordance with the intention of the testator. It can never be applied where the result would be contrary to the express desire of the testator, and it cannot be denied that for Bacon's property to be used as a park open to both races would be directly contrary to his wishes, as stated in the will.

Contrary to the contention of petitioners, the Georgia court was not concerned with whether Negroes might spoil the use of the park for white persons, or whether, as a matter of fact white persons would "enjoy" using the property as a park on an integrated basis. The court's only concern was whether such use would violate Bacon's restriction that the property be used by white persons only, and clearly it would.

No federal rights have been denied petitioners, as the "federal interest" of petitioners is no more than that if Baconsfield were continued in existence as a park, it would have to be operated on a non-discriminatory basis. This the Georgia Court recognized and accepted. There was no Federal requirement that the Georgia court construe Bacon's will in such a manner that would result in Baconsfield continuing as a park, when such construction would not be authorized by the will, and would be contrary to the laws of Georgia.

Any possible question of racial discrimination, or of impermissible state action, was eliminated by this Court's decision in **Evans v. Newton**, supra, for with the failure of the trust, and the reversion of the property into the estate of A. O. Bacon, the property has been removed

from the "public" sphere. In the decision under consideration, there is no question of anyone being discriminated against because of race, nor is it conceivable that the decision could be considered as one which would encourage racial discrimination. On the contrary, the Georgia courts expressly recognized that Bacon's property cannot be used as a park on a racially discriminatory basis.

In summary, it is the position of respondents that this case involves the construction of a Georgia will by a Georgia court in accordance with Georgia law, and nothing else, and in no way have any rights guaranteed petitioners by the Federal Constitution been denied.

ARGUMENT.

I.

Introductory: State and National Law.

In response to petitioners' introductory statement, we reaffirm—and reassert—our firm conviction that the decision of the Supreme Court of Georgia involved nothing more than the application of well-settled principles of Georgia law to a Georgia will. Furthermore, no rights guaranteed petitioners by the Fourteenth Amendment, or by any other provision of the U. S. Constitution, have been denied; nor is the decision of the Georgia court in any way inconsistent with the decision of this Court in **Evans v. Newton**, 382 U. S. 296 (1966).

As petitioners concede that Georgia courts have the power to "say when, under Georgia law, a trust has terminated,"³ (Petitioners' brief, p. 38), we would acknowledge that Georgia cannot have laws which do not measure up to the requirements of the Constitution; nor can Georgia courts deny persons before them constitutionally guaranteed rights. Thus, unless the Georgia law which governed the disposition of the case in the state court itself violates the Fourteenth Amendment, or the Georgia court actually denied petitioners rights guaranteed them by the Federal Constitution, the decision of the Georgia Supreme Court must be affirmed.

The two fairly recent decisions of this Court which petitioners cite in support of their contentions relative to the supremacy of the Constitution have no relevance to

³ It is well-settled that the construction of wills is the responsibility of state courts. As this court stated in **Lyeth v. Hoey**, 305 U. S. 180, 59 S. Ct. 155 (1938): "The local law determines the right to make a testamentary disposition . . . and the condition essential to the validity of wills, and the state courts settle their construction." 59 S. Ct. at 158. (Emphasis supplied.)

the issues in this case except perhaps insofar as they are useful in illustrating why no federal question is present.

In **Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church**, 89 S. Ct. 601 (1969), the action of the Georgia court had been governed by the principle of Georgia law which "implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches." Id. at 603. This meant that Georgia law required the state court to make its own interpretation of church doctrines and to determine "matters at the very core of a religion." Id. at 607. This, the U. S. Supreme Court ruled, was action which is proscribed by the First Amendment.

Likewise, in **New York Times v. Sullivan**, 376 U. S. 254 (1964), this court had to consider a principle of state law which had been applied by the Alabama court. It was concluded that the Alabama rule of law which had been applied did not measure up to constitutional requirements as it failed to provide safeguards for freedom of speech and of the press which are required by the First and Fourteenth Amendments.

Thus, in both **Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church**, *supra*, and **New York Times v. Sullivan**, *supra*, the Court had before it cases which involved the application of state laws which did not meet the requirements of the U. S. Constitution. In the case at bar, we do not understand petitioners' contentions as including an attack on the Georgia law which was applied in the state court. And, of course, there would be no ground for such an attack as the state law which was applied is neither unusual or discriminatory. The law is simply that when the purpose for which a trust was created becomes im-

possible of accomplishment, the trust fails and the corpus reverts to the testator's estate by operation of law. See **Evans v. Newton**, 221 Ga. 870, 871. This principle of property law (which is by no means peculiar to Georgia) has absolutely nothing whatever to do with segregation or integration, nor does it in any conceivable way violate the Fourteenth Amendment.

Secondly, the decision of the state court in no way denied to petitioners any rights guaranteed them by the United States Constitution, for the "right" to use Baconsfield was subject to the property continuing to be used as a park. In this regard, petitioners possessed exactly the same rights as did all other persons in the community. But neither petitioners, nor anyone else, had any right to require the property to continue to be used as a park, when such use would violate Bacon's prohibition against the property being used as a park on an integrated basis.

In summary, the law which was applied by the Georgia court was clearly not unconstitutional, and no rights guaranteed petitioners by the Federal Constitution have been denied. Therefore, the decision of the Georgia Supreme Court should be affirmed.

II.

The Decision of the Court Below Is Not Hostile to the Petitioners' Right to Immunity From Racial Discrimination.

A. The Decision of the Georgia Supreme Court Did Not Infringe Upon Any Rights Guaranteed Petitioners by the Fourteenth Amendment; Nor Does It Encourage Racial Discrimination. The Decision Involved Nothing More Than the Construction of a Georgia Will by a Georgia Court in Accordance With Georgia Law.

The "immediate contemporary facts" with which petitioners choose to begin their Fourteenth Amendment argu-

ment are not the "facts" with which the Georgia court was directly concerned. On the contrary, the Georgia court had only two basic "facts" to consider, one being this Court's decision in **Evans v. Newton**, 382 U. S. 296 (1966), and the other, of course, being Bacon's will. The fact that Negroes had used the park in violation of the terms of the trust, and that the City had not taken affirmative action to enforce the racial provisions in the trust, had nothing directly to do with the decision of the Georgia court which is herein complained of. These were matters which had transpired prior to and were encompassed in this Court's decision in **Evans v. Newton**, *supra*. The "showing", then, upon which the Georgia court acted was this Court's ruling that Bacon's property could not be used as a park on other than an integrated basis, something which would be contrary to Bacon's express wishes; and the basis of the Georgia decision was a construction of Bacon's will in the light of this ruling, and in the framework of Georgia's laws relative to wills and trusts.

The problem with petitioners' argument is that they completely ignore the distinction which must be made between the federal question of the manner in which the park would have to be operated if it continued in existence as a park, and the state law question involving the construction of the will (in the light of the ruling of this court that the property could not be used in conformity with the racial conditions set forth in the will). We submit that the "federal interest" of petitioners is no more than that if Baconsfield were continued in existence as a park, it would have to be operated on a non-discriminatory basis. This, of course, the Georgia court recognized and accepted. There is no basis for the implication that there was an additional federal requirement that the Georgia court construe Bacon's will in such a manner that would result in Baconsfield continuing as a park, when such construction would not be authorized

by Bacon's will, and would be contrary to his expressed intention and the laws of Georgia. The determination of the effect of carrying out the provisions of Bacon's will was peculiarly a matter which addressed itself to the state court. See, e. g., **Lyeth v. Hoey**, 305 U. S. 180, 59 S. Ct. 155 (1938). And as Mr. Justice Black observed in his dissenting opinion in **Evans v. Newton**:

“So far as I have been able to find, the power of a state to decide such a question (reversion) has been taken for granted in every prior opinion this Court has ever written touching the subject.” **Evans v. Newton**, 382 U. S. 296 (1966).

Petitioners' characterization of the Georgia judgment as being a “penalty” (or a “sanction”) which was imposed upon the City of Macon because of its inability to enforce racial segregation at Baconsfield does not comport with the facts and constitutes a gross inaccuracy. A fair and objective reading of the opinion of the state court could lead no one to the conclusion that the Georgia court “imposed” trust failure (and reversion) because its members did not want an integrated park, or because the court wanted to punish the City of Macon. It is obvious, we think, that petitioners are attempting to fabricate impermissible state action where none exists. In so doing, they paint a totally false picture; one which is clearly refuted by the record. Reversion occurred **only** because the trust failed, and the trust did not fail because the City did not undertake to enforce the racial restriction, but, rather, it failed because this Court had ruled that an indispensable element of Bacon's plan for Baconsfield could not be complied with. The Georgia Supreme Court did not look to the will to “justify” its judgment. It looked to the will to determine what its judgment had to be.

Accurately speaking, the actual decision of the Georgia court had nothing whatever to do with racial discrimina-

tion as such. This issue had been completely eliminated by the decision in **Evans v. Newton**, 382 U. S. 296 (1966). The decision of the Georgia court was based upon a set of facts which can, and must, be divorced from any consideration of the merits of Bacon's social philosophy. The Georgia court had to start with the fundamental proposition that in construing Bacon's will all parts and provisions of the will had to be considered. See **Yerby v. Chandler**, 194 Ga. 263, 21 S. E. 2d 636 (1942). The wisdom of these provisions was not in issue. Thus, the Georgia court had before it on the one hand Bacon's clear expression of intention that he wanted a park **only** for "white women, white children . . .", and that he was unequivocally opposed to the two races using recreation grounds "together and in common". On the other hand, this court had ruled that Bacon's property could not be used as a park unless it was open to members of both races. Certainly, it cannot be denied that for the property to be used as a park open to members of both races would be directly contrary to the clearly expressed intention of Bacon. That was a fact which the Georgia court had to accept. As a matter of Georgia law, property devised in trust for a charitable use cannot be diverted from that use to one not intended or authorized by the testator, and *a fortiori*, it cannot be devoted (or subjected) to a use of which the testator has expressly stated he disapproves. Therefore, accepting the foregoing as facts which the Georgia court could not blithely ignore (even if perhaps the members of the court might personally have disagreed with Bacon's social philosophy), the court had no alternative but to recognize that as a matter of Georgia law the trust had failed.⁴ We say, without hesi-

⁴ For the Georgia Court to have failed to recognize that the trust had failed would have resulted in a deprivation of respondents' property without due process of law. See **Charlotte Park & Recreation Commission v. Barringer**, 252 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 (1956).

tation, that the philosophy of the individual justices as to segregation by race had nothing to do with the decision of the Georgia court.

We disagree with the assertion that the Georgia decision will be cited for "the proposition that state courts may generally decree reversion of property for breach of a racial condition." Petitioners overlook the fact that this case does not involve property which had been purchased subject to a racial condition. This was Bacon's property, and it is fundamental that a person who creates a charitable trust can make the use of his property subject to conditions.⁵ That is not to say that a testator could require that his property be used in a manner contrary to law, but it does mean that under no circumstances could the property be used in a manner violative of the express conditions imposed upon the use of the property by the testator. It is one thing for a court to say, in effect, that as a matter of public policy it is not going to let a testator's property be used in the manner he would like it to be, and, indeed, quite another to go further and say that since the property cannot be used in the prescribed manner it will be put to another use even though the testator specifically stated that he disapproved of such use.

Contrary to the contention of petitioners (Petitioners' brief, p. 41) the decision of the Georgia court is not at

⁵ As Mr. Justice Harlan noted in his concurring opinion in **Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church**: "I do not, however, read the Court's opinion to go further to hold that the Fourteenth Amendment forbids civilian courts from enforcing a deed or will which expressly and clearly lays down conditions limiting a religious organization's use of the property which is granted. If, for example, the donor expressly gives his Church some money on the condition that the Church never ordain a woman as a minister or elder . . . or never amend certain specified articles of the Confession of Faith, he is entitled to the money back if the condition is not fulfilled." 89 S. Ct. 601, 607 (1969).

all inconsonant with **Reitman v. Mulkey**, 387 U. S. 369 (1967) (or with any other decision of this court). In **Reitman**, *supra*, it was found that the state had involved itself in private racial discrimination to an unconstitutional degree. The court was concerned with state involvement in actual racial discrimination, both present and prospective. In the decision under consideration, there is no question of anyone being discriminated against because of race; and, certainly, there is nothing which would remotely suggest that the state has encouraged, or been in any way involved with constitutionally impermissible racial discrimination. It was Bacon, not the State of Georgia, who decreed that his property would not be used as an integrated park, and no one has any **right**, federal or otherwise, to require that the property be used in a manner contrary to the restrictions placed upon the use of the property by Bacon. And, of course, with the removal of the property from the "public" to the private sphere any possible question of state action which would violate the Fourteenth Amendment has been eliminated. It is indeed difficult to conceive how the Georgia decision, which expressly recognized that Bacon's property could not continue to be used as a segregated park, could in any way "encourage racial discrimination."

Likewise, petitioners' contention that Negroes will be discouraged "from asserting their rights" (Petitioners' brief, p. 41) is a hollow argument. This was not "public property" in the usual sense. It was trust property, the use of which was subject to conditions set forth in Bacon's will. Furthermore, as a practical matter it is most unlikely that there is a similar situation in existence anywhere else in the country. Also, petitioners should hardly be concerned that the Georgia decision would suggest similar testamentary trusts to other persons, for it is now settled that a testator, or settlor, could not validly devise or convey his property to a municipal corporation in trust with a racial

condition. Nor could a municipal corporation accept such a trust. It is apparent, we think, that petitioners are trying to raise an issue which does not exist.

Although the construction of wills is peculiarly a matter for the application of state law by state courts, petitioners urge upon this Court the contention that the Georgia court incorrectly construed Bacon's will. Looking at the will in even a cursory manner, one cannot help but be impressed by the fact that Bacon planned for his park with the greatest of care and deliberation. This park, which was to be a memorial to Bacon's two sons, was by no means to be just another "city park." Instead, Bacon's park was to be subjected to conditions not applicable to other parks; and the operation and management of the park were vested in a Board of Managers which was to (and did) function entirely independent of the City and its governing body.

As for the racial restriction, we can hardly imagine Bacon having used language which would have more clearly indicated his intent that the use of his property should be extended to white persons only, or which would have more clearly indicated that this limitation was an essential and indispensable part of his plan for Baconsfield. Indicative of Bacon's careful planning in this regard is the fact that not only was he careful to limit Baconsfield to white persons, but also he provided that the white men of Macon, and white persons from other communities, would be admitted only at the pleasure of the Board of Managers. Furthermore, he authorized the Board to "exclude at any time any person or persons of either sex, who may be deemed objectionable."

Insofar as this litigation is concerned, obviously, the most significant passage in Bacon's will is that which explains why he so carefully limited the use of Baconsfield to the "white women, white girls, white boys, and

white children of the City of Macon.” The racial limitation was not included because of any feeling of hostility toward colored people, nor was it prompted by a desire to be charitable only to persons of his own race, or because Bacon felt that the presence of Negroes would “spoil” the park for white persons. Instead, it was that as a matter of personal social philosophy, Bacon was:

“. . . without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common” (A. 21).

Petitioners have suggested several reasons why they think the Georgia court erred in its construction of Bacon’s will, none of which, we submit, has any merit.

First, they argue that neither Bacon nor any other person “has any lawful power” to exclude Negroes from Baconsfield park. As has been pointed out, there is no dispute about the fact that Bacon’s property cannot now be used for a park operated on a segregated basis. However, at the time Bacon’s will was probated, and up until this Court’s decision in 1966, there was no adjudicated constitutional prohibition against the operation of Baconsfield in a manner consistent with the requirements set forth in Bacon’s will. The fact that some 50 years after the probate of Bacon’s will it was decided by the United States Supreme Court that the park which Bacon created cannot continue to be operated for white persons only did not give the Georgia court, or any court, the right to rewrite Bacon’s will to delete those restrictions relative to the use of the park by white persons. There is clearly a difference between a court determining that a trust cannot continue to be operated in accordance with the testator’s intent because such operation would be contrary to law, and a holding that because of this, the “illegal”

words will simply be disregarded. In such a situation as existed in this case, a court would in any event have to construe the will under consideration in light of the failure of the trust, and would have to determine whether or not *cy pres* could be applied, and if it could not, then the property would revert by operation of law. In no event could the testator's intention simply be disregarded or ignored.

The second consideration advanced by petitioners relates to the fact that Bacon did not expressly provide for reverter upon failure of the trust. It is probable that Bacon never actually considered that his trust would fail, for at the time he drafted his will (and up until 1966) his plan for Baconsfield was entirely lawful. The absence of a clause providing for express reversion is of absolutely no significance whatever insofar as Georgia law is concerned. As the Georgia Supreme Court pointed out, the property did not revert under the terms of the will; it reverted because of Ga. Code Sec. 108-106 (4) which provides that upon the failure of an express trust, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs. Stated differently, when the trust failed, reversion occurred as a matter of law in the absence of a gift over.

We submit that a fair and reasonable reading of Bacon's will leads to the undeniable conclusion that under no circumstances could Bacon's property ever be used as an integrated park. While Bacon may not have specifically contemplated a trust failure, he **did** expressly state that he was "without hesitation in the opinion that in their social relations the two races should be **forever** separate and . . . they should not have pleasure or recreation grounds to be used or enjoyed together and in common." Bacon's will is certainly not "silent on this point."

Petitioners are in error when they suggest that the Georgia court should have considered what "a Georgian who died over 50 years ago" would prefer. The Georgia court was constrained to consider only what **Bacon** (and no one else) would have wanted had he known that his plan for Baconsfield would someday become impossible of accomplishment; and, in answering this question, the Georgia court could look only to Bacon's will. That is to say, the court could not speculate as to what a hypothetical Georgian might have desired; nor could it engage in speculation as to what use might be made of the property upon reversion. There is no law, state or federal, which would permit a court to "update" a testator's social philosophy. Suffice it to say, the Georgia court was bound by Bacon's intention as manifested in all of the provisions of his will. See **Yerby v. Chandler**, 194 Ga. 263, 21 S. E. 2d 636 (1942).

Petitioners are also wrong when they imply that respondents are attempting to mislead by stressing "that one action—maintenance of the park with Negroes in it—will violate Senator Bacon's will, while utterly submerging the fact that the other action—destroying the park forever—will also cardinally violate Senator Bacon's will (Petitioners' brief, p. 44). It is no doubt true that Bacon would not have wanted his trust to fail, but it did fail, and it failed not because of any "action"⁶ on the part of the Georgia court, but because an essential element of the trust became impossible of accomplishment. Under the circumstances which not exist, reversion could have been avoided only if Bacon had provided for a gift over, but this he did not do. The

⁶ The application of *cy pres* would have involved affirmative action by the court, and under generally recognized principles of trust law *cy pres* can never be applied where the result would be contrary to the express desire of the testator. IV **Scott, Trusts**, Section 339.1 at 2831 (2d ed. 1956).

trust having failed, the property has to go somewhere, and under Georgia law it reverts by operation of law.

In an obvious attempt to "infect" the decision of the Georgia court, petitioners suggest that the court was free to "choose" between "reversion" on the one hand, and continuation of the park on an integrated basis on the other (Petitioners' brief, p. 46). The implication is that this was a "choice" which in actuality depended upon the personal predilections of the members of the court, rather than upon Bacon's will. This is not true. When the trust failed, reversion followed automatically, regardless of what the members of the Georgia court might have preferred (or chosen) had they been "Bacon's agents". The irrevocable "choice" was made by Bacon when he spelled out in detail that his property was to be used as a park for white persons only. And this "choice" as **expressed in the will** precluded the Georgia court, or any other court, from ever applying *cy pres* in the manner sought by petitioners.

Petitioners imply at page 47 of their brief that because a Georgia court recognized that the trust had failed, there has been unconstitutional state action. This is not so. The fact that a Georgia court has rendered an opinion which did not accept petitioners' contentions does not mean that the state has denied them any constitutional rights.⁷ One must have a right before it can be denied, and neither petitioners nor anyone else had a right, federal or otherwise, to require Bacon's property to be used as an integrated park. Suffice it to say, persons who are members of a particular religion, race or class may not create rights merely by asserting claims in a state court and having them denied.

⁷ The Fourteenth Amendment is violated only where a court has taken an action on the basis of race or some purely arbitrary classification which action has denied persons rights to which they are entitled.

Petitioners, persistently minimizing the use of funds provided by the Board of Managers from rentals, suggest that the activity of the City during the period it was trustee was relevant to the issues before the Georgia court. We disagree. The fact that during the period of years when the park was being operated by the Board of Managers in accordance with Bacon's will, workmen from the City worked at Baconsfield, or that the City had any other contact or connection with the park had no bearing on the question of whether or not there had been a trust failure, and likewise had no bearing on the question of reversion, or the applicability of the doctrine of *cy pres*. It would indeed be a radical introduction into the law of trusts for a court to hold that a trustee (or anyone else) could, in effect, alter the provisions of a testamentary charitable trust by spending money (or doing anything else) in connection with the trust property. Certainly, a trustee could never acquire title to the trust property in the absence of action on the part of the person who established the trust. This is true no matter how much money the trustee might spend on the trust property. In essence, the Georgia court was concerned solely with the question of whether or not the trust had failed and (upon recognizing that it had) whether or not *cy pres* could be applied. What might have happened between the time the trust became operative and the date of termination was of no relevance.

A case illustrative of the fact that the expenditure of funds by a municipality in connection with trust property would not prevent reversion is **Charlotte Park & Recreation Commission v. Barringer**, 252 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 (1956). In that case it was stated:

“If Negroes use the Bonnie Brae Golf Course, the determinable fee . . . automatically will cease and ter-

minate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer.” 88 S. E. 2d at 123.

Also, see 39 Am. Jur., Parks, Squares and Playgrounds, Sec. 21, where it is stated that where land is dedicated to a municipality as a park, it “must be preserved or the land will revert to the original proprietor.” Also, cf. **Bennett v. Davis**, 201 Ga. 58, 39 S. E. 2d 3 (1946).

While we do not view the activity of the City as having any bearing on the issues which were before the Georgia court, as a matter of interest, we would point out that there is nothing at all inequitable about the fact of reversion, as during the period of time the City was trustee, a large segment of the community was entitled to use Baconsfield. The situation is not at all unlike that where a municipality leases property to be used as a park. Certainly, no one would suggest that the City could acquire any greater rights in the land than provided for in the contract with the owner.

B. The Decision of the Georgia Court Rests Solely Upon a Construction of Bacon's Will, and in No Way Rests Upon Any Proposition, Either of Law or Fact, That the Presence of Negroes Would Affect the Enjoyment of a Park by White Persons.

The contention that the Georgia Supreme Court based its decision upon the ground that the presence of Negroes “spoils” a park for whites is totally without merit, or justification. The Georgia court was not in the least concerned with any factual consideration of whether or not the presence of Negroes might “frustrate” the enjoyment of a park by whites, nor was the court concerned with the question of whether or not the property was large enough to accommodate both the whites and Negroes of the community. Simply stated, petitioners miss the

point when they talk solely in terms of "enjoyment". Whether or not white persons in the community might actually "enjoy" using Baconsfield in conjunction with Neroes, was **not** the question. Instead, the court's only concern was whether such use would violate Bacon's restriction that his property be used by white persons only. Clearly it would, for Bacon's concern was not that Negroes might adversely affect the enjoyment of the park by white persons, but rather it was that he was opposed to the mixing of the races in social relations. Stated differently, Bacon viewed an integrated park as being affirmatively objectionable, and regardless of the fact that many white persons might not object to using such a park, Bacon did not want his property so used.

Petitioners speak in terms of the "affirmative purpose of the trust" (Petitioners' brief, p. 51) as if to imply that the Georgia court would have been justified in disregarding the racial restriction on the ground that such restriction was "negative". The Georgia court, of course, had to construe the will as a whole and to give consideration to all of its parts, including those which qualified the use of the property. Under a proper construction of Bacon's will, Bacon had only one intent, one purpose, to-wit, to create a park . . . "for the **sole** . . . use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon . . ." His plan for a park for these persons was a comprehensive, cohesive, interlocking one which may not be divided into sections or parts, and the racial limitation was very much a fundamental part of the trust purpose.

In Bacon's mind, a park which would be used by both races was significantly different from a park which would be used only by members of one race, in that a park of the former type would be contrary to his personal social philosophy. While Bacon wanted to furnish a park for white persons in the community, his charitable intention

was obviously conditioned upon the park being used by whites only. Otherwise, his property would be put to a use which he considered wrong, to-wit, a recreation ground used jointly by members of both races.

Petitioners suggest that the Georgia court could have reached the result which they deem to be socially desirable by applying the doctrine of *cy pres*. *Cy pres*, however, is not applied as a matter of course in every instance of charitable trust failure. Instead, it is available only where a testator has evinced a general charitable intention, and the prescribed **mode** of accomplishing this charitable purpose has failed. Here, what has become impossible of accomplishment is not simply a "mode" of fulfilling a more general charitable purpose, but instead an essential and integral part of Bacon's plan for Baconsfield has become impossible of accomplishment.

As one court has expressed it:

"Although (a) Court cannot apply a fund held in trust, or subject to a trust, *cy pres* unless it be held for a charitable purpose, it by no means follows that all funds held for a charitable purpose may be applied *cy pres* upon the failure of the particular purpose for which they are held. It is only when the testator evinces a general charitable intention to be carried into effect in a particular mode which cannot be followed, that the words may be construed so as to give effect to the general intention (Citations). **Absent such general charitable intention, even though the specific purpose be a charitable one, when it fails, unless there be a valid alternate disposition thereof in the will, there is a resulting trust . . .**" **First Universalist Society of Bath v. Swett**, 90 A. 2d 812 (Me. 1953). (Emphasis supplied.)

Of equal importance is the fact that *cy pres* can be applied "only for the purpose of carrying out what would

probably have been in accordance with the intention of the testator." IV **Scott, Trusts**, Section 339.1, at 2831 (2d ed. 1956). It can **never** be applied where the result would be contrary to the express desire of the testator. *Ibid.*

For a Georgia court (and surely this was a matter for the state court to decide) to have applied *cy pres* in the manner sought by petitioners, would have resulted in Bacon's property being put to a use of which he very clearly and expressly disapproved, and to apply *cy pres* in this manner would be contrary to Georgia law.

Actually, the result desired by petitioners (under any of their theories) could be obtained only by returning to our jurisprudence the rightfully rejected doctrine of the royal prerogative. This doctrine, which was a part of the early English common law, permitted the sovereign in a situation such as this to apply property for any charitable purpose he might deem appropriate. According to Scott:

"The exercise of the prerogative power by a biased or cynical or whimsical king sometimes resulted in devoting the property of the testator to purposes of which he would never have approved, purposes which might run entirely counter to his wishes . . ." IV **Scott, Trusts**, Sec. 399.1, at 2829 (2d ed. 1956).

This doctrine is not accepted in any of the states, and certainly not in Georgia. In **Jones v. Habersham**, 107 U. S. 174, it was stated, ". . . the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal prerogative is exercised . . ."

Scholars who wish to point out the obvious evils of the doctrine of the royal prerogative cite as a classic case of injustice, **DeCosta v. DePas**, 1 Amb. 228, 2 Swanst 487 (1754). In that case, a Jewish testator had left money in

trust to establish an assembly for reading Jewish law and instructing people in the Jewish religion. This was deemed to be illegal as promoting a religion contrary to the established religion of the state. The king thereupon diverted the trust fund so that it would be used to instruct persons in the Christian religion.

Bacon's great emphasis on his racial limitation and his express disapproval of recreational areas which would be used by members of both races together and in common show that a "desegregated" park would indeed be as contrary to his wishes as the final disposition in **DeCosta v. DePas**, *supra*, would have been to the testator in that case.

A case of interest because it involved a testamentary devise of property for a "playfield" for white children is **LaFond v. City of Detroit**, 357 Mich. 362, 98 N. W. 2d 530 (1959). In that case, the will in question placed far less emphasis on racial restrictions than does Bacon's. Nevertheless, the Supreme Court of Michigan held in an evenly divided opinion that the unambiguous racial limitation in the gift to the City for a playfield for white children could not be eradicated through the application of *cy pres*.

The will under consideration provided:

"The balance of my estate after deducting the above bequests is to be given to the City of Detroit, Wayne County, Michigan, for a playfield for white children, to be known as the 'Sagendorph Field.' "

The will contained no express reverter clause, nor was there any further indication of a racial limitation other than as above quoted.

The "Field" was left as a memorial to the testatrix's husband.

The Detroit Common Council passed a resolution accepting the bequest conditional upon a judicial construc-

tion of the residuary clause which would allow the City to make the playground available to all children without regard to race, color or creed.

The heirs of the testatrix filed a bill of complaint requesting that the residuary clause be held void. The City of Detroit filed defensive pleadings alleging that the bequest was valid principally because the doctrine of *cy pres* was in effect in Michigan. The lower court found for the heirs.

In affirming that judgment by an evenly divided court the Supreme Court of Michigan stated:

"We are considering a gift of the bulk of deceased's estate to the City and deceased's express wish must be respected and carried out irrespective of this Court's desire to aid and encourage the creation of city playgrounds for children of all races and colors. The words in the will commanding that the Will 'be carried out to the letter' cannot be forgotten or disregarded. Deceased expressed in unambiguous language that she was making a bequest for the establishment of a 'playfield for white children'."

With respect to the argument that *cy pres* should be applied the Court said:

"There is nothing in the will nor in the record disclosing a more general purpose than the specified purpose—a playfield for white children—and there is nothing in the will or record which in the slightest way indicated deceased desired the money to be applied to any other purpose than 'a playfield for white children'."

"The *cy pres* doctrine is used to aid the court in carrying out the true intention of the donor and cannot be used for the purpose of eliminating the unambiguous words found in deceased's will."

"We agree with the trial court 'for white children' are words of command and the *cy pres* doctrine cannot be invoked to validate the residuary bequest." (Emphasis supplied.)

Petitioners charge that the Georgia court "necessarily decided that the racial limitation in Senator Bacon's will was of more dignity and importance than his equally or more solemn and explicit provisions for the perpetuity of this trust" (Petitioners' brief, p. 58). This is wrong. The racial limitation in the will was entitled to, and given, no more "dignity" than any other provision of Bacon's will; but it **was** entitled to consideration in its proper perspective, and this is something petitioners refuse to recognize. Giving the provisions relative to the racial restriction their common sense meaning, and construing the will as a whole, it can hardly be denied that *cy pres* could never be applied in such a manner that would result in Bacon's property being used as an integrated park. If there was any "policy decision" made by the Georgia court, it was only that the end does not justify the means, and thus *cy pres* was not used as an unauthorized means to rationalize a result not authorized by Bacon's will or Georgia law.

Petitioners do a serious injustice to the members of the Georgia Supreme Court when they charge that the judgment of that court "implies espousal . . . of an estimate that racial mixture is crucially undesirable" (Petitioners' brief, p. 59). There is nothing in the record which would justify anyone concluding that the members of the Georgia court shared Bacon's feelings on race. The merits (or demerits) of Bacon's philosophy were not in issue. The Georgia court had to accept what it found, and regardless of the personal opinions of the individual members of the Georgia court, the racial limitation which Bacon placed upon the use of his property could not be ignored. To rule otherwise would hardly promote—would subvert—

the long standing policy of the law, both legislative and judicial, to encourage gifts for charitable purposes, both public and private.

In summary, whether or not the presence of Negroes spoils a park for whites was not in issue. Rather, the controlling consideration was Bacon's will and, notwithstanding the fact that whites might enjoy using a park in conjunction with Negroes, it is clear that an integrated park would be directly contrary to Bacon's intentions as expressed in his will.

C. The Racial Restrictions in Bacon's Will Could Not, Under Any Theory, or for Any Reason, Have Been Treated by the Georgia Court, or Any Other Court, as "Nullities". The Georgia Court, in Construing Bacon's Will, Had to Consider These Provisions Along With All Other Provisions of the Will.

The arguments advanced by petitioners in Sections C and D of their brief are rather closely related in that they all call for the court to disregard, and ignore, very fundamental parts of Bacon's testamentary plan; therefore, we will consider these arguments together.

The statement in the headnote to Section C that the Georgia court had to choose between "Bacon's contradictory wishes" is inaccurate. Bacon very clearly had only one wish, one intention, one purpose, to wit: to have his property used as a park for the white persons of his community, and only for the white persons. Under a proper construction of the will, Bacon's "wish" that his property be used as a park cannot be separated from the condition that the park be used **solely** by white persons. There was nothing contradictory in the least about Bacon's plan for Baconsfield and the Georgia court did not have to "choose" between any contradictory or inconsistent passages in the will. Instead, as has been discussed, the Georgia court had before it a very simple set of facts

which presented no "choicers" or options. The result which obtained was mandated by these facts.

Petitioners go to great lengths in attacking Georgia Code Section 69-504, a statute which, we submit, has no relevance whatever to the issues in this case. While we strongly disagree with petitioners' contentions and conclusions with respect to Section 69-504,⁸ even if we should assume *arguendo* that Bacon could not have provided for

⁸ We do not find Section 69-504 to be germane to the issues in this case. Furthermore, we disagree with petitioners' analysis of this statute and the effect it had upon Georgia law.

A park, of course, is properly the subject matter of a charitable trust (see, e.g., **Burbank v. Burbank**, 152 Mass. 254, 25 N. E. 427 (1890), and there is no reason to believe that a park for a substantially large segment of the community would not have been entirely valid in Georgia either prior, or subsequent, to the enactment of 69-504. According to **Restatement, Trusts**, Section 379 (1959), a charitable trust for a limited class of beneficiaries will fail only "if the persons who are to benefit are not of a sufficiently large or definite class so the community is interested in the enforcement of the trust" (Also, see 15 **Am. Jur.** 2d, Charities, Section 6). It is unlikely indeed that a Georgia court would have found that the white women and children of a community such as Macon did not constitute a large enough class. Thus, even in the absence of 69-504, Bacon could have limited his beneficence to the white women and children of the community, or, if he had desired, to the women and children of all races. That 69-504 is merely declaratory of the common law is further supported by the decision of the Georgia Supreme Court in **Evans v. Newton**, 220 Ga. 280, 138 S. E. 2d 573 (1964), where the court stated:

"The law of Georgia does not by Code Section 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color or creed. Such limitation, however, standing alone, is not invalid, and this court has sustained a testamentary charity naming trustees for establishing and maintaining 'a home for indigent colored people 60 years of age or older residing in Augusta, Georgia.' **Strother v. Kennedy**, 218 Ga. 180 (127 S. E. 2d 19)." *Id.* at 285. (Emphasis supplied.)

Also see **Burbank v. Burbank**, 152 Mass. 254, 25 N. E. 427 (1890), where the Massachusetts Supreme Court stated:

"The proposed devise of a testator of a tract of land for a park was also a public charity. Bequests to improve a

a segregated park without Section 69-504, and, also, that this statute evidenced the state's interest in racial separation, it would not, and does not, follow that because of the existence of this statute all references to the racial condition in Bacon's will are to be judicially eliminated. The statute may fall but it would not necessarily carry Bacon's will, or any part thereof, with it. If this should carry Bacon's will with it, it would do so in toto and not in part only.

If we should accept petitioners' analysis of the Georgia law (and we do not), the result would be twofold (at the most), viz: (1) The Georgia statute authorizing a testator to leave property to a municipal corporation in trust subject to a racial condition would be deemed unconstitu-

town, as by providing for a public garden, by improving its streets, by providing for the planting of shade trees, have been held to be of this character (Citation). A gift is a public charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons. Even if its benefits are confined to specified classes, as decayed seamen, laborers, farmers, etc. of a particular town, it is well settled that it is a public charity." (Emphasis supplied.)

Incidentally, we do not share petitioners' difficulty in viewing a park as promoting "human civilization". Likewise, we reject the implication that because in Bacon's time (and also now) a person could, if so desired, establish a park by "dedicating" his property to the general public, all parks had to be created in this manner. There is nothing in Georgia law which would suggest that a park could not be created by conveying property to a trustee with the direction that the park be open to a group or class which did not include the general public. An example of such a park might be one which would be for the use of the children of a particular community, but which would not be open to adults or to children from other communities.

As for **Brown v. Gunn**, 75 Ga. 441 (1885) (Petitioners' brief, p. 65), if there is no suggestion that "dedication" could have been to the white public only, there is also no suggestion that a person who desired to have his property used as a cemetery for whites only could not have accomplished that very purpose by the use of a trust (as opposed to dedication to the general public).

tional, and (2) No park created "under the authority of this statute"⁹ could continue to be operated on a racially segregated basis. In no event, however, would any provision of a will establishing for such a park simply be ignored as if it did not exist.

There is no question but that petitioners are urging a most radical departure from fundamental concepts of will construction when they talk about treating any provision of a will as being a mere "nullity" which can be disregarded as if it did not appear in the will. They are saying nothing less than that the Georgia court should have "rewritten" Bacon's will so that what they would consider to be a socially desirable result would have obtained. This is simply not the law. As has been discussed, if a charitable trust fails because an indispensable provision thereof is deemed to be unenforceable the result is not an *ipso facto* elimination of that provision from the will, but instead it then becomes the duty of the court to consider whether under the circumstances then existing *cy pres* can, or cannot, be applied.

The cases which petitioners cite as having a bearing on the effect of the alleged "taint"¹⁰ lend no support to their argument, and, if anything, they point up the obvious weakness of petitioners' contentions.

In **Burton v. Wilmington Parking Authority**, 365 U. S. 715 (1961), it was held, in effect, that the operator of a restaurant who leased space in a state owned building (because of the relationship with the state) had to comply with the "proscriptions of the Fourteenth Amendment" (i. e., as long as he continued to operate the

⁹ See footnote 8.

¹⁰ In view of the issues before the court when this case was last before it, we think it fair to assume that the use of the word "taint" which petitioners refer to has reference only to the question of affirmative enforcement of the racial conditions.

restaurant he could not discriminate on the basis of race). Petitioners cite specifically Mr. Justice Stewart's concurring opinion in which he stated that the Delaware statute which authorized refusal of service to persons deemed offensive to a proprietor's other customers had been interpreted by the Delaware Supreme Court as authorizing discrimination based upon race, and therefore the statute was unconstitutional. If the statute had been declared unconstitutional then the effect of such a ruling would have been that henceforth restaurant owners could not have acted pursuant to the statute. The only possible significance the **Wilmington Parking Authority** case could have on the Baconsfield case would be with respect to the question of whether or not the park could continue to be operated on a segregated basis, a matter which is now no longer in issue. There is nothing in **Burton v. Wilmington Parking Authority**, supra, either in the majority opinion or in Mr. Justice Stewart's concurring opinion, which would remotely suggest that the restaurant had to continue to be operated if the lessee did not want to operate it on a racially non-discriminatory basis. Likewise, there is no federal requirement that Baconsfield continue as a park in violation of Bacon's will.

In **Peterson v. City of Greenville**, 373 U. S. 244 (1963), the manager of the local S. H. Kress store asked certain Negroes to leave the white lunch counter because they were violating a state law which required¹¹ that restaurants be segregated. When the Negroes refused to leave they were arrested and subsequently convicted for violating the state's trespass statute. The U. S. Supreme Court reversed the convictions on the ground that they had the effect of enforcing municipally required segregation and thus there was involved state action violative of the Fourteenth Amendment. The practical effect of the

¹¹ See, 69-504 did not require that a testator restrict the use of a park to members of one race or the other.

Peterson decision was that, at least in Greenville, the owner of a restaurant could not continue to operate a restaurant on a segregated basis (unless, perhaps, he could have done so by resorting to self-help). But, as in **Wilmington**, this certainly did not mean that S. H. Kress Company or any other restaurant owner was under an affirmative duty to continue to operate a restaurant.

Rietman v. Mulkey, 387 U. S. 369 (1967), is cited as having a bearing on petitioners' argument that the state suggested and encouraged segregation. Petitioners create a credibility chasm when they infer that Section 69-504 might have had something to do with Bacon restricting the use of Baconsfield to white persons.¹² Certainly, anyone who has even scanned the will with the slightest degree of objectivity could not seriously suggest that Section 69-504 was in the slightest way responsible for Bacon's strong conviction that the park be operated on a segregated basis. This is particularly true since Bacon actually explained why he was imposing the racial limitation. And to suggest that Bacon, the "careful lawyer", might have been concerned about a court misconstruing the word "may" is to defy common sense. The statute is not confusing or bewildering in the least. Furthermore,

¹² Further evidence of the fact that 69-504 had no effect whatever on Bacon's plan for Baconsfield can be found in Item 10th of the will where he provided that if it were held that the City of Macon did not have the legal power under its charter to hold the property in trust "for the purposes so specified", appropriate legislation was to be obtained to confer that power upon the City. Ga. Code, Sections 69-504 and 60-505, of course, expressly recognized the power of any municipality in Georgia to serve as trustee for such purposes. It is reasonable to assume then, that Bacon did not know of these two sections when he drafted the passages of his will providing for Baconsfield Park, and it is reasonable to conclude that these passages were lifted from an earlier draft of his will completed before the enactment of 69-504 and 69-505. Thus, any similarity between the wording of his will and that of the statute probably demonstrates that the statutes were patterned to fit his will rather than the other way around.

the weakness of petitioners' argument becomes even more apparent when we realize that neither the State of Georgia nor the City of Macon at any time required segregation in its parks.

The implication that Bacon might have wanted to open his park to women and children of both races is, of course, totally without foundation, particularly in view of Bacon's strong feelings about the use of playgrounds by the two races "together and in common."

We submit that if Section 69-504 falls because it is unconstitutional, it does not carry with it an individual's will which provided for a related testamentary disposition (or even one which was "dependent" upon the statute). The will still remains and all of its provisions must be considered in arriving at a proper construction. As we see it, Section 69-504 would have a bearing on the issues present in this case only if it had actually affected Bacon's intentions as expressed in the will. For example, if Bacon had stated in his will that he wanted a park for all of Macon's citizens but he felt Section 69-504 prohibited this then, of course, the Georgia court would have taken this into consideration. But, it is abundantly clear that Section 69-504 was not in the remotest way responsible for Bacon's racial condition and Bacon cannot be penalized, or have his property appropriated to a use of which he disapproved, simply because the State in which he resided happened to have a statute which authorized him to do what he did (and what he could have done even if there had never been any such statute).

Petitioners continue their Section 69-504 argument in Section D where they contend that Bacon's will "rested" upon Georgia Code, Section 69-504, and since this statute has always been unconstitutional (so petitioners erroneously contend) those provisions of Bacon's will which provide for the racial restriction should simply be stricken.

Assuming *arguendo* that 69-504 was in fact unconstitutional, its provisions could be (to use petitioners' words) "stricken" only because the statute was promulgated by the state legislature, and the 14th Amendment forbids State sponsored racial discrimination. Bacon's will, of course, was solely the product of Bacon, a private citizen, and no matter how discriminatory the provisions of his will might be, they cannot be treated in the same manner as a state statute, for the 14th Amendment does not reach private discrimination. While Bacon's plan can no longer be carried out, there is no law, state or federal, which would authorize any court to "strike out" any part of the will, leaving those portions pleasing to petitioners to stand.

The Georgia Supreme Court considered the contention that Georgia Code, Section 69-504 was unconstitutional even at the time it was enacted, and correctly concluded that for it to "hold that the trust provision of Senator Bacon's will was made pursuant to an unconstitutional Code Section, would have the effect of making the trust impossible of performance (**Smith v. DuBose**, 78 Georgia 413, 434), and thus cause a reversion under Code Section 108-106 (4)" (Opinion of Georgia Supreme Court, A. 542).

We agree with the Georgia Supreme Court that whether or not Section 69-504 was, or was not, constitutional at the time of its enactment has no bearing on the issues in this case for the same result obtains in either event. Nevertheless, we would note in passing, and in defense of Section 69-504, that this statute was in fact constitutional "even under **Plessy v. Ferguson**."¹³ Section 69-504 ha-

¹³ Also see **Evans v. Newton**, 382 U. S. 296, 86 S. Ct. 480 where Mr. Justice Harlan stated in a dissenting opinion:

"(I)t could hardly be argued that the statute in question was unconstitutional when passed, in light of the then-prevailing constitutional doctrine; that being so, it is difficult to perceive how it can now be taken to have tainted Senator Bacon's will at the time he made his irrevocable choice. 86 S. Ct. at 497.

absolutely nothing whatever to do with a park system established by a city. Even if it did, whether or not a system provided for "separate but equal" parks would obviously depend upon an examination of the particular park system under consideration. Furthermore, neither the State of Georgia nor the City of Macon has ever had a statute or ordinance requiring racial segregation in parks; therefore, the "separate but equal" doctrine could hardly be in issue.

It also should be noted that while Section 69-504 authorized a testator to provide for a park that would be racially segregated, it did not require that such a park necessarily be segregated (**Evans v. Newton**, 220 Ga. 280, 138 S. E. 2d 573 (1964)).

Petitioners proffer several other theories which they think would authorize the court to treat portions of Bacon's will as "nullities". They begin Section D by suggesting that one reason Bacon's will should be accorded such unusual treatment is because the provisions of his will relative to Baconsfield Park "became tantamount to City ordinances." (Petitioners' brief, p. 50.) Petitioners cite no authority in support of this unusual proposition, and, of course, there is none. A will does not lose its identity or status as a will simply because a municipality is named as the trustee of a testamentary trust.

Ordinances are commonly understood to be enactments of the legislative body of a municipal corporation. If a court accepted the proposition that the provisions of a will could somehow be considered to become city ordinances, then it would logically follow that the governing body of the city would have the power to alter the provisions of the will in the same manner they could amend "other city ordinances." We can hardly imagine a more fundamental (or more unacceptable) departure from the law of wills.

The "factual" reasons which petitioners cite in support of their argument that Bacon's will should be treated as a city ordinance are equally without merit. There is certainly no basis for the statement that the provisions of Bacon's will were "promulgated and espoused by the City with respect to the conduct of this public park." (Petitioners' brief, p. 71.) It was Bacon, and not the City of Macon, who promulgated these provisions. Furthermore, the management of the park was vested, not in the City, but in a Board of Managers whose sole responsibility was the operation of the park in accordance with Bacon's will.

The contention that Bacon actually intended for the provisions of his will to "speedily gain" the status of city ordinances (Petitioners' brief, p. 72) is not only without foundation, it is pure fantasy. There is not the slightest indication in the will that Bacon had any such intention. Furthermore, had Bacon intended to involve the City to such an extent (and under Georgia law, we know of no way for him to have elevated his will to the status of a city ordinance) it hardly seems likely that he would have provided for the park to be managed by a Board of Managers rather than by the City.

The "philosophy" of **Marsh v. Alabama**, 326 U. S. 501 (1946), has no application to the case under consideration, for the situation in the present case differs markedly from that which existed in **Marsh**, *supra*. The fundamental difference (and the only one necessary to comment upon) is that, with the failure of the trust, Bacon's property has been completely removed from the "public sphere"; and, therefore, there can be no question of anyone being denied any constitutional rights.

While **Marsh v. Alabama**, *supra*, might have been of possible relevance to the question of whether Bacon's property could continue to be used as a segregated park,

it is of no significance whatever insofar as the state law question of trust failure is concerned.

Certainly, the Supreme Court in **Marsh**, supra, did not suggest that the Gulf Shipbuilding Company was under any sort of affirmative obligation to continue to use the property which it owned as a "company town". On the contrary, if the company had felt strongly about the matter they could have removed their property from the "public sphere" by devoting it to a different use. The Supreme Court was concerned solely with the operation and regulation of the town, and not with any duty of the company to actually continue to use the property as a town so as to enable persons to exercise their constitutional right to distribute leaflets to persons who reside in such towns.

Nor can petitioners find support in either **Commonwealth of Pennsylvania v. Brown**, 392 F. 2d 120 (3rd Cir. 1968), cert. denied 391 U. S. 921 (1968) or **Sweet Briar Institute v. Button**, 280 F. Supp. 312 (W. D. Va. 1967) rev'd per curiam, 387 U. S. 423, decision on the merits, 280 F. Supp. 312 (1967), for in neither of these cases was trust failure (and reversion) in issue. The decision of the Georgia court is completely consistent with these decisions, for it was expressly recognized that the racial restriction could not be enforced.

We do not share petitioners' surprise that the Georgia Supreme Court did not deem it necessary to discuss petitioners' contentions with respect to dedication. That there had been no dedication to the general public was so obvious as not to require elaboration. The very words of the will clearly negate any intention on Bacon's part to "dedicate" his property to the use of the general public. On the contrary, Bacon was most specific in limiting the use of his property to a particular segment of the community. And when one devises property in trust to be used only for a certain specific purpose, and only by a

specific segment of the community then no one, be it the trustee or a court, has any right to put the property to any use except as would be consistent with the terms of the will. As was stated in **Brown v. City of East Point**, 148 Ga. 85, 95 S. E. 962 (1918):

“Where the dedication, express or implied, is made for a specific purpose, the public authorities have no power to use the property for any purpose other than the one designated (Citation). Property dedicated to a particular purpose cannot be the dedicatee, a municipality, be diverted from the purpose except under the right of eminent domain.”

And if the use to which land is “dedicated” or conveyed in trust is not preserved, or fulfilled, then “the land will revert to the original proprietors.” 39 **Am. Jur.**, Parks, Squares and Playgrounds, Section 21.¹⁴

Dedication is by definition a matter of property law, and whether or not a tract of Georgia property has been dedicated to the general public is very fundamentally a consideration controlled by Georgia law. The federal law command, as expressed in this court’s decision in **Evans v. Newton**, 382 U. S. 296 (1966), is only that if Bacon’s property were to be continued to be used for a park, it would have to open to members of both races. This, we submit, has nothing whatever to do with the state law question of whether or not, **when Bacon executed his will**, he “dedicated” his property to the use of the general public.¹⁵

¹⁴ Also see 23 **Am. Jur.** 2d, Dedication, Section 68:

“Where property dedicated to the public is abandoned or relinquished, the public’s rights in the property are terminated and, by operation of law, it reverts to the original dedicator or to his heirs or grantees, at least when a mere easement was created by the dedication, or when, under an applicable statute, the dedication vested a fee in trust for public use.”

¹⁵ There was, of course, no federal requirement that Bacon dedicate his property to the general public.

Dedication results from an act on the part of the property owner and whether or not property has been "dedicated", and the extent of any such dedication, is answered by examining the act of the dedicating (in this case, Bacon's will). If the will did not result in the property being dedicated to the public at large, and obviously it did not, then there was no dedication to the general public, and something which happened many years later cannot alter this fact.

In summary, under no theory advanced by petitioners (or under any other theory) could any provision of Bacon's will have been treated as a nullity, for it was the obligation of the Georgia Court to construe the will as a whole, and to consider all parts and provisions thereof, including those provisions which limited the use of the property.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 60

REVEREND E. S. EVANS, ET AL., PETITIONERS

v.

GUYTON G. ABNEY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The case is fully stated in the brief filed on behalf of the petitioners and we do not recapitulate the facts here. We submit this short memorandum to focus on particular arguments and to express the interest of the United States.

The government participated in this Court when the case was here before as *Evans v. Newton*, No. 61, October Term, 1965, 382 U.S. 296. As it happens, the United States has a special connection with Baconsfield through substantial federal aid granted for the improvement of the facility some years ago and assurances then received that the public character of the park would not be changed. It is, moreover, a

matter of concern that all the residents of a municipality have been deprived of an important public facility on account of race. Then, as now, however, there was more at stake than non-discriminatory enjoyment of a large recreational park in Macon, Georgia.

As the case returns, it involves potentially far-reaching questions relating to the enforcement of racially restrictive stipulations in grants establishing charitable trusts. The United States speaks to those issues because of the continuing national concern to eradicate race discrimination in our public life.

ARGUMENT

The ultimate question in this case is whether a large recreational park which this Court has held subject to the constitutional rule of nondiscrimination shall be closed and the property returned to private hands rather than being opened up to the Negro citizens of the area. The Georgia courts have so decreed, declining to disregard the now unenforceable racially restrictive provision of the will which established the park half a century ago. Those who support the judgment below—including the administrators of the park, the trustees of the property, and the heirs of the testator, with no opposition from the municipality which would lose an important recreational facility—argue that this decision ends the matter, insisting that there is no federal constitutional question involved. We disagree, sharing the view of the petitioners that the Fourteenth Amendment stands in the way of this result.

1. At the outset, we confront the claim that the case involves nothing more than the construction of a will and an application of the local law of charitable trusts and therefore presents no federal question whatever. The answer, we suggest, is that given by this Court when immunity from scrutiny was asserted with respect to a discriminatory exercise of the generally absolute power to redefine municipal boundaries: insulation from federal judicial review "is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion v. Lightfoot*, 364 U.S. 339, 347. The traditionally local setting does not oust the constitutional inquiry when the charge is, as here, that State action threatens to deny important public benefits on the ground of race.

What is more, the present case does not intrude far into the traditional domain of private choice. No one here is remotely suggesting review of the motives—even racial bias—which govern the decisions of testators in writing or rewriting wills or establishing trusts. Nor, for that matter, do the present arguments call into question the power of any private individual to revoke a grant, terminate a trust, or close an established facility over which he has retained control—or to abandon a business—rather than comply with a federal constitutional or statutory requirement of non-discrimination. We deal only with affirmative *State action* withdrawing a public facility to avoid a declared obligation to cease discrimination on the basis of race.

And, finally, the case does not involve any real issue of construing a testator's actual intent. Although Sen-

ator Bacon made clear that he shared the prevailing prejudice of his time and place against the "mixing" of the races "in their social relations," then thought to include the use of recreational facilities (cf. *Civil Rights Cases*, 109 U.S. 3, 22, 24), he did not express himself on the question whether the racial restriction in his grant, if unenforceable, should defeat his intention to establish a public park. There is no way of knowing what his choice would have been had he known the present alternatives when he wrote his will. Still less is there any basis for saying that he would wish Baconsfield closed altogether after half a century because the law now requires that Negroes also be admitted. It is obvious the Senator never adverted to the eventuality that his "perpetual" grant should be withdrawn from the public and given over to his heirs. Indeed, it is doubtful whether any right of reversion was meant to be attached to his gift to the municipality.

The fact of the matter is that the decision to prefer closure to non-discrimination is not attributable to Senator Bacon, but to the State of Georgia, acting through its courts, at the prompting of the administrators of the park (who may, in that capacity, be deemed public officers, since they are administering a public facility). The reversion of the Baconsfield property to private hands did not occur automatically, by operation of law: the active participation of an agency of the State necessarily intervened before that result could be accomplished. Nor was the decree a mere formality, inexorably predetermined by events. There were many alternatives, one of which had to be se-

lected. Our submission is that Georgia contravened the Fourteenth Amendment by making a discriminatory choice.

2. What were the options? In the first place, the restrictive provision might have been treated as not written, because contrary to overriding public policy embodied in the supreme law of the land. Cf. *Hurd v. Hodge*, 334 U.S. 24, 34-36. In the absence of any indication that a comparable facility was then available to the Negro residents of Macon, it is doubtful that Senator Bacon's attempt to exclude them totally from a public park satisfied even the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537, prevailing in 1911 when the will was written. And it is at least arguable that the intervening decision in *Buchanan v. Warley*, 245 U.S. 60, outlawed racial restrictions of this kind before the bequest of the park property to the public was executed in 1920. But even if it was only later that it became constitutionally unenforceable, the Georgia courts might have struck the clause prospectively, thus avoiding giving any effect to an offensive stipulation. Cf. *Barrows v. Jackson*, 346 U.S. 249, 254.

Another alternative was to decline reversion on the ground that the park had been irrevocably dedicated to the public. As we have noted, Senator Bacon's will did not provide for contingent reversion to his heirs; on the contrary, the instrument required that "all right, title and interest" in the property, expressly including "all remainders and reversions," be vested in the municipality, for the "perpetual and unending"

benefit of the public, and, specifically, to be "forever used and enjoyed as a park and pleasure ground," "under no circumstances" to be "sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use" (A. 19; see also, the last sentence of Item 3rd of the Codicil, at A. 30). Both the deed from the executors to the City executed upon delivery of the property in 1920 (A. 353; see also A. 405-409) and later representations made to the United States (A. 440-441, 448, 451) indicate an indefeasible title in the municipality. So, also, the actual use of the park by the public for half a century argued against implying a requirement of reversion. See Ga. Code § 85-410.

Of course, if the municipality had been found to hold an irrevocable title to the property, the decree below could not have been entered. The suit of the heirs, lacking any legal interest, would have been dismissed. The City itself presumably could not close the park merely to avoid desegregation. Cf. *Griffin v. School Board*, 377 U.S. 218. And, at all events, the city was not praying for such a result; indeed, the State Attorney General, representing the public beneficiaries, was, at least formally, urging continuance of the park (see A. 502, 509, 512, 515).

Finally, the most obvious solution was to apply the *cy pres* principle to continue Baconsfield as a public park, albeit desegregated, on the ground that this would be carrying out the dominant purpose of the charitable trust. See Ga. Code § 108-202. Surely, it would have been natural to view the establishment of a public recreational facility as the main object of

the trust and to find that the constitutionality required admission of Negroes—which did not oust the original class of beneficiaries—would not defeat that goal. A charitable court might indulge the supposition that Senator Bacon himself would amend his grant to remove the exclusionary clause if he were alive in the changed circumstances of today. But, however that may be, it was certainly within the normal boundaries of the *cy pres* doctrine to treat as incidental, and not of the essence, the racial stipulation attached to the trust. Indeed, it is difficult to understand how the courts below could find that exclusion of Negroes, rather than continuation of the park as a public facility, was the fundamental purpose of the grant.

In our view, the availability of the several less drastic options, each apparently consistent with local law, invalidates the choice made. That is true, we believe, even if each of the alternatives was equally permissible as a matter of State law. Whatever the proper limits of the principle that the Constitution is not violated by neutral State action unavoidably supporting a private discriminatory decision, but see *Shelley v. Kraemer*, 334 U.S. 1, the claim of neutrality will not avail when, in light of other possible solutions, the means selected needlessly aids discrimination. Cf. *Reitman v. Mulkey*, 387 U.S. 369. As a matter of fact, however, it seems plain that the courts below were not confronted with an evenly balanced series of options; everything favored a resolution that would permit continuation of the park. In the circumstances, we are inevitably led to the conclusion that in preferring the last resort of reversion the

Georgia courts were applying a special rule which accords critical weight to racial restrictions. It is of course immaterial whether the rule was independently fashioned by the courts or merely reflects the public policy of the State. In either case, impermissible governmental action is present: the attempt to escape official responsibility by invoking Senator Bacon's supposed preference cannot succeed. Cf. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725.

3. It only remains to respond briefly to the suggestion that the decree below cannot offend the Constitution because the petitioners and the class they represent have no "federal right" to enjoy Baconsfield Park and thus have not been legally injured by the action which closes it. There are several answers.

To be sure, the Fourteenth Amendment does not grant petitioners a right, *simpliciter*, to enjoy the Baconsfield property. But it does assure that they shall not be excluded from the benefits of a public facility on the ground of race. And that is precisely what is threatened here: the method is a total closure of the park, but the purpose is racial, and the effect, so far as Negroes are concerned, is the same as if whites remained free to enjoy the park. It does not alleviate the practical injury to the class that others also are adversely affected by the discriminatorily motivated action. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer, supra*, 334 U.S. at 22. It is, moreover, plain that the disadvantaged Negro community of Macon will suffer unequally by the

withdrawal of Baconsfield to private lands. Cf. *Griffin v. School Board, supra*.

There is another aspect to the decision below. The fact is that Negroes are to be deprived of the park solely because they insist on exercising their declared right to share it so long as it remains open to the public. That is more than imposing an impermissible penalty on the assertion of a constitutional right, cf. *Shapiro v. Thompson*, 394 U.S. 618, 631; the consequence is so drastic as wholly to discourage the bootless effort in future. Cf. *Barrows v. Jackson, supra*. And there is of course a corresponding encouragement to resist voluntary acquiescence in non-discrimination. That, too, is an involvement forbidden to State officers by the Fourteenth Amendment. Cf. *Reitman v. Mulkey, supra*; *Anderson v. Martin*, 375 U.S. 399; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463.

Finally, and perhaps most important, the decision below injures the Negro citizens of Macon in the same fundamental sense as all officially supported racial discrimination. Here, as in *Strauder v. West Virginia*, 100 U.S. 303, 308, the published official action directed at Negroes as a race "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." This alone condemns the action of the State courts, regardless of whether petitioners can show any more tangible loss. Cf. *Brown v. Board of Education*, 347 U.S. 483, 493-495. As we view it, the decision strains to reach the extreme result of reversion and thereby announces an official view that the

Negro's presence in the park would be so obnoxious that it is preferable to close the facility altogether. That, we submit, is a plain denial of that "equal protection of the laws" which the Fourteenth Amendment was framed to assure.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

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NOVEMBER 1969.

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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1969.

No. 60.

**REVEREND E. S. EVANS, et al.,
Petitioners,**

v.

**GUYTON G. ABNEY, et al.,
Respondents.**

On Writ of Certiorari to the Supreme Court of Georgia.

**RESPONDENTS' REPLY TO MEMORANDUM OF THE
UNITED STATES OF AMERICA.**

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**RESPONDENTS' REPLY TO MEMORANDUM OF THE
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INTRODUCTION.

The Solicitor General of the United States filed a memorandum in support of Petitioners, and counsel for Respondents received a copy of the memorandum on Saturday, November 8, 1969. This response to the memorandum is filed pursuant to permission granted by the Court dur-

ing the course of oral argument on Thursday, November 13, 1969.

Substantially all of the contentions made by the Solicitor General (the "Government") have also been made by Petitioners, and consequently we have already considered them in our main brief. Thus, a detailed response to the Government's memorandum is not necessary. There are, however, several observations which should be made.

First, the Government clearly overstates the significance of this case as it relates to "the enforcement of racially restrictive stipulations and grants establishing charitable trusts."¹ As the record so plainly shows, the racial condition in Senator Bacon's will has **not** been "enforced", but, the exact opposite has occurred for the Georgia Court recognized that the racial condition could not be enforced. The charitable trust questions which might have been present in **Evans v. Newton**, 382 U. S. 296 (1966), are not present here for the trust has failed and, with reversion, the property has been removed from the public sphere. Clearly this is not a case which involves "race discrimination in our public life".

RESPONSE TO ARGUMENT.

The Government begins its argument by stating that the ultimate question is whether the park will be closed and the property returned to the heirs, or will be opened up to Negroes. While, generally speaking, that may be a correct statement of the effect of a decision one way or the other, it is certainly not the question that was passed upon by the Supreme Court of Georgia. Rather, the ques-

¹ We submit, though, that a reversal of the decision of the state court would indeed transform this case into one of significance because of the effect it would have upon the relationship between the state and federal judicial systems, and in particular upon the role of state courts in deciding questions of state law.

tion was whether under state law, in the light of the controlling impact of **Evans v. Newton**, *supra*, the purpose of Bacon's trust had failed with a resulting reversion of the property. The state court decision was not based "on the ground of race" as the memorandum states, but on the basis of applying settled principles of state law in the light of this Court's holding in **Evans v. Newton**, *supra*.

Boiled down, the essence of the Government's argument is that the Supreme Court of Georgia erred in its determination and application of state law. They would have this Court substitute its judgment for that of the highest court of a state as to what result was required under the law of the state. That this is so clearly illustrated by their attempt to enumerate the so-called "options" that were available to the Court.

They argue first that the restrictive provision might have been treated "as not written". Under what provision of law? The law of Georgia (and presumably of all other states) is that in determining the intent of a testator a court must look to the instrument as a whole, and it cannot ignore or treat as surplusage any part of a will if that result reasonably can be avoided. See **3 Redfearn, Wills and Administration in Georgia**, Section 142 (3d ed. 1965). Applying settled rules of construction under Georgia law, the Georgia Court construed the purpose of Bacon's will as being to create a trust solely and exclusively for the benefit of the white persons of the community and found that this purpose was impossible of attainment in view of the holding in **Evans v. Newton**, *supra*. Such a conclusion was mandated by the plain meaning of Bacon's will and a holding to the contrary would have been in direct conflict with Georgia law.

It is next suggested that reversion might be declined on the ground that the park has been "irrevocably dedi-

cated to the public". The answer to this argument, of course, is that the record in the case shows no dedication factually and the State Supreme Court further found, as a matter of state law, that there had been no such dedication. Whether or not Georgia property has been dedicated to the public under Georgia property law is peculiarly a matter to be decided by Georgia courts. As this Court stated in **Marsh v. Alabama**, 326 U. S. 501, 66 S. Ct. 276 (1946):

“We do not question the state court's determination of the issue of 'dedication'. That determination means that the corporation could if it so desired, entirely close the sidewalk and the town to the public and is decisive of all questions of state law which depend on the owner's being estopped to reclaim possession of, and the public's holding title to, or having received an irrevocable easement in, the premises.”
(66 S. Ct. at 278) (Emphasis supplied.)

Finally, the argument that the “cy pres principle” should have been applied does particular violence to state law. Under Georgia law (and presumably the law of all states) cy pres is not applied as a matter of course in every instance of charitable trust failure.² Instead, it may be applied only where a testator has evinced a general charitable intention, and the prescribed mode of accomplishing this charitable purpose has failed. Here, what has become impossible of accomplishment is not simply a “mode” of fulfilling a more general charitable purpose,

² “It is not true that a charitable trust never fails where it is impossible to carry out the particular purpose of the testator. In some cases, as we shall see, it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose becomes impossible of accomplishment. In such a case the cy pres doctrine is not applicable.” IV Scott, Trusts, Sec. 399 at 2825 (2d ed. 1956).

but instead, as the Georgia Supreme Court stated, “(T)he sole purpose for which the trust was created has become impossible of accomplishment.”

There is absolutely no basis for any suggestion that the decision in the case at bar is in any way inconsistent with, or contrary to, prior decisions of the Georgia Courts. A will, of course, is *sui generis* and it is rare indeed when will construction cases involve identical facts or issues. However, the basic principles of law which are applied in such cases are constant, and we submit that an examination of prior Georgia decisions which involved the construction or application of the Georgia law of *cy pres* readily reveals that the decision of the Georgia Supreme Court in the instant case is completely consistent with prior decisions of the Georgia courts.

While Georgia courts have from time to time applied *cy pres*, they have done so only when the facts before them warranted its application. No Georgia court has ever applied *cy pres* where there was an absence of a general charitable intention, or where the application of *cy pres* would result in the property being put to a use of which the testator stated he disapproved.

It is significant that the Government, in discussing the “options” available to the Georgia court, did not cite a single Georgia case and referred only obliquely, and in a general way, to two code sections. The Government characterized the supposed options as being “each apparently consistent with local law.” (Emphasis supplied.) The Supreme Court of Georgia has held that none of these options is consistent with Georgia law, and, to the contrary, they are all inconsistent. Surely this Court will not see fit to accept the unsupported conclusions as to Georgia law found in the memorandum in preference to the solemn adjudication of the highest court of that state, whose decision was reached following consideration of complete

briefs and oral arguments submitted by counsel for Petitioners and Respondents. Such a course, we submit, would inevitably lead to a destruction of the state judicial systems.

Lacking any real ground on which to bring the Fourteenth Amendment into play, the Government attempts to overcome this hurdle by implying that the members of the Georgia Supreme Court were not concerned with construing Bacon's will in accordance with Georgia law, but instead were motivated solely by a desire to "avoid" integration, and chose as their "method" the closing of a "public park". Such a contention is both an unjust reflection upon the members of the state court, and a gross and unwarranted distortion of the record and the facts in this case.³

The Governmet cites **Gomillion v. Lightfoot**, 364 U. S. 339 (1960), in support of the contention that State action has operated to deny "public benefits on the ground of race".⁴ **Gomillion** is hardly relevant to the issues before this Court; however, the citing of this case by the Government does point up one of the underlying fallacies in its argument. The Government approaches the role of the state court in this case as though it possessed the same prerogatives and options which are available to legislative bodies. A legislative body, while operating within a framework of law, has significant leeway in exercising dis-

³ The position of the Government is even more untenable when one considers the fact that the public parks in Macon are open to all citizens of the community and the decision of the court below could hardly be construed as having any effect upon integration in the public sphere. This is obviously not a situation where a community has chosen to close all of its parks, swimming pools, schools, etc., for the sole purpose of avoiding integration.

⁴ **Gomillion** involved an attack upon an act of the Alabama legislature, the rather obvious purpose of which was to remove substantially all of the Negro Citizens from the city limits of Tuskegee, Alabama and thus deny them the right to vote.

cretion and deciding and implementing matters of policy. A court, on the other hand, must apply the law as it finds it to the facts in the case before it, regardless of the results which obtain, and regardless of whether or not the members of the court are of the opinion that a different result would better serve the general welfare of the community. Simply stated, the only "option" available to the Georgia court was that of construing the will in accordance with Georgia law.

There is one other brief comment which should be made with respect to the role of the state court in this case. The Government states that reversion did not occur automatically but that it took "the active participation of an agency of the State". In a very limited sense, "active participation of an agency of the State" is required before any reverter, express or implied, can ever occur, absent agreement of all concerned, since a controversy as to reverter can only be settled finally by a court decree. But that is the full extent of the participation of the Georgia courts in this instance. As pointed out in our main brief, the absence of an express reverter clause in Bacon's will is immaterial under Georgia law. Georgia Code, Section 108-106 (4) provides that where an express trust fails for any reason, a resulting trust is implied for the creator of the trust or his heirs. Once the Georgia Court recognized that the trust had failed, the property did revert to Bacon's heirs by "operation of law", namely by the application of the Georgia Code Section binding upon the state court. The state court had no choice but to follow the law.

In conclusion, we would simply restate our firm conviction that the decision of the Supreme Court of Georgia involved nothing more than the construction of a Georgia will in accordance with Georgia law, and no rights guaranteed Petitioners by the Fourteenth Amendment have been violated.

CONCLUSION.

For the foregoing reasons, and for the reasons set forth in our main brief, we respectfully submit that the judgment of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1969

E. S. Evans et al., Petitioners, | On Writ of Certiorari to
v. | the Supreme Court of
Guyton G. Abney et al. | Georgia.

[January 26, 1970]

MR. JUSTICE BLACK delivered the opinion of the Court.

Once again this Court must consider the constitutional implications of the 1911 will of United States Senator A. O. Bacon of Georgia which conveyed property in trust to Senator Bacon's home city of Macon for the creation of a public park for the exclusive use of the white people of that city. As a result of our earlier decision in this case which held that the park, Baconsfield, could not continue to be operated on a racially discriminatory basis, *Evans v. Newton*, 382 U. S. 296 (1966), the Supreme Court of Georgia ruled that Senator Bacon's intention to provide a park for whites only had become impossible to fulfill and that accordingly the trust had failed and the parkland and other trust property had reverted by operation of Georgia law to the heirs of the Senator. 165 S. E. 2d 160 (1968). Petitioners, the same Negro citizens of Macon who have sought in the courts to integrate the park, contend that this termination of the trust violates their rights to equal protection and due process under the Fourteenth Amendment. We granted certiorari because of the importance of the questions involved. 394 U. S. 1012 (1969). For the reasons to be stated, we are of the opinion that the judgment of the Supreme Court of Georgia should be, and it is, affirmed.

The early background to this litigation was summarized by MR. JUSTICE DOUGLAS in his opinion for the Court in *Evans v. Newton*, 382 U. S., at 297-298:

"In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that 'in their social relations the two races (white and negro) should be forever separate.' The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.

"Thereupon, individual members of the Board of Managers of the Park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the court appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

"Several Negro citizens of Macon intervened, alleging that the racial limitation was contrary to the laws and public policy of the United States, and asking that the court refuse to appoint private trustees. Thereafter the city resigned as trustee

and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

The Georgia court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and bequeath his property to a limited class, that charitable trusts are subject to supervision of a court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. 220 Ga. 280, 138 S. E. 2d 573."

The Court in *Evans v. Newton, supra*, went on to reverse the judgment of the Georgia Supreme Court and to hold that the public character of Baconsfield "requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law." 382 U. S., at 302. Thereafter, the Georgia Supreme Court interpreted this Court's reversal of its decision as requiring that Baconsfield be henceforth operated on a non-discriminatory basis. "Under these circumstances," the state high court held, "we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated." *Evans v. Newton*, 221 Ga. 870 (1966). Without further elaboration of this holding, the case was remanded to the Georgia trial court to consider the motion of Guyton G. Abney and others, successor trustees of Senator Bacon's estate, for a ruling that the trust had become unenforceable and that accordingly the trust property had reverted to the

Bacon estate and to certain named heirs of the Senator. The motion was opposed by petitioners and by the Attorney General of Georgia, both of whom argued that the trust should be saved by applying the *cy pres* doctrine to amend the terms of the will by striking the racial restrictions and opening Baconsfield to all the citizens of Macon without regard to race or color. The trial court, however, refused to apply *cy pres*. It held that the doctrine was inapplicable because the park's segregated, whites-only character was an essential and inseparable part of the testator's plan. Since the "sole purpose" of the trust was thus in irreconcilable conflict with the constitutional mandate expressed in our opinion in *Evans v. Newton*, the trial court ruled that the Baconsfield trust had failed and that the trust property had by operation of law reverted to the heirs of Senator Bacon. On appeal, the Supreme Court of Georgia affirmed.

We are of the opinion that in ruling as they did the Georgia courts did no more than apply well-settled general principles of Georgia law to determine the meaning and effect of a Georgia will. At the time Senator Bacon made his will and still today, Georgia cities and towns are authorized to accept devises of property for the establishment and preservation of "parks and pleasure grounds" and to hold the property thus received in charitable trust for the exclusive benefit of the class of persons named by the testator. Ga. Code Ann., c. 69-5 (1959); Ga. Code Ann. § 108-203, 207 (1959). These provisions of the Georgia Code explicitly authorized the testator to include, if he should choose, racial restrictions such as those found in Senator Bacon's will. The city accepted the trust with these restrictions in it. When this Court in *Evans v. Newton*, 382 U. S. 296 (1966), held that the continued operation of Baconsfield as a segregated park was unconstitutional, the particular purpose

of the Baconsfield trust as stated in the will failed under Georgia law. The question then properly before the Georgia Supreme Court was whether as a matter of state law the doctrine of *cy pres* should be applied to prevent the trust itself from failing. Petitioners urged that the *cy pres* doctrine allowed the Georgia courts to strike the racially restrictive clauses in Bacon's will so that the terms of the trust could be fulfilled without violating the Constitution.

The Georgia *cy pres* statutes upon which petitioners relied provide:

"When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention." Ga. Code Ann. § 108-202 (1959).

"A devise or bequest to a charitable use will be sustained and carried out in this state; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator." Ga. Code Ann. § 113-815 (1959).

The Georgia courts have held that the fundamental purpose of these *cy pres* provisions is to allow the court to carry out the general charitable intent of the testator where this intent might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator. *Moss v. Youngblood*, 187 Ga. 188 (1938). But this underlying logic of the *cy pres* doctrine implies that there is a certain class of cases in which the doctrine cannot be applied. Professor Scott in his

treatise on trusts states this limitation on the doctrine of *cy pres* which is common to many States¹ as follows:

"It is not true that a charitable trust never fails when it is impossible to carry out the particular purpose of the testator. In some cases . . . it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the *cy pres* doctrine is not applicable." IV Scott, Trusts § 399, at 3085 (1967).

In this case, Senator Bacon provided an unusual amount of information in his will from which the Georgia courts could determine the limits of his charitable purpose. Immediately after specifying that the park should be for "the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon," the Senator stated that "the said property under no circumstances . . . (is) to be . . . at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized." And the Senator continued:

". . . I take occasion to say that in limiting the use and enjoyment of the property perpetually to white people, I am not influenced by an unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

¹ See e. g., *First Universalist Society v. Swett*, 90 A. 2d 812 (Me. 1953); *LaFond v. City of Detroit*, 357 Mich. 362 (1959).

"I am however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

The Georgia courts, construing Senator Bacon's will as a whole, *Yerby v. Chandler*, 194 Ga. 263 (1942), concluded from this and other language in the will that the Senator's charitable intent was not "general" but extended only to the establishment of a segregated park for the benefit of white people. The Georgia trial court found that "Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield." App., at 519. Since racial separation was found to be an inseparable part of the testator's intent, the Georgia court held that the State's *cy pres* doctrine could not be used to alter the will to permit racial integration. See *Ford v. Thomas*, 111 Ga. 493 (1900); *Adams v. Bass*, 18 Ga. 130 (1855). The Baconsfield trust was therefore held to have failed, and, under Georgia law, "[w]here a trust is expressly created, but [its] uses . . . fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." Ga. Code Ann. § 108-106(4) (1959).² The Georgia courts concluded, in

² Although Senator Bacon's will did not contain an express provision granting a reverter to any party should the trust fail, § 108-106(4) of the Georgia Code quoted in the text makes such an omission irrelevant under state law. At one point in the Senator's will he did grant "all remainders and reversions" to the city of Macon, but the Supreme Court of Georgia showed in its opinion that this language did not relate in any way to what should happen upon a failure of the trust but was relevant only to the initial vesting of the property in the city. The Georgia court said:

"Senator Bacon devised a life estate in the trust property to his wife and two daughters, and the language pointed out by the

effect, that Senator Bacon would have rather had the whole trust fail than have Baconsfield integrated.

When a city park is destroyed because the Constitution required it to be integrated, there is reason for everyone to be disheartened. We agree with petitioners that in such a case it is not enough to find that the state court's result was reached through the application of established principles of state law. No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated. *Presbyterian Church v. Hull Church*, 393 U. S. 440 (1969); *New York Times v. Sullivan*, 376 U. S. 254 (1964). Here, however, the action of the Georgia Supreme Court declaring the Baconsfield trust terminated presents no violation of constitutionally protected rights, and any harshness that may have resulted from the State court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will.

Petitioners first argue that the action of the Georgia court violates the United States Constitution in that it imposes a drastic "penalty," the "forfeiture" of the park,

intervenors appears in the following provision of the will: 'When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust etc.' This language concerned remainders and reversions prior to the vesting of the legal title in the City of Macon, as trustee, and not to remainders and reversions occurring because of a failure of the trust, which Senator Bacon apparently did not contemplate, and for which he made no provision." 165 S. E. 2d 160, 165 (1968).

merely because of the city's compliance with the constitutional mandate expressed by this Court in *Evans v. Newton*. Of course, *Evans v. Newton* did not speak to the problem of whether Baconsfield should or could continue to operate as a park; it held only that its continued operation as a park had to be without racial discrimination. But petitioners now want to extend that holding to forbid the Georgia courts from closing Baconsfield on the ground that such a closing would penalize the city and its citizens for complying with the Constitution. We think, however, that the will of Senator Bacon and Georgia law provide all the justification necessary for imposing such a "penalty." The construction of wills is essentially a state-law question, *Lyeth v. Hoey*, 305 U. S. 180 (1938), and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia court had no alternative under its relevant trust laws, which are long standing and neutral with regard to race, but to end the Baconsfield trust and return the property to the Senator's heirs.

A second argument for petitioners stresses the similarities between this case and the case in which a city holds an absolute fee simple title to public park and then closes that park of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands. Yet, assuming *arguendo* that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because there it is the State and not a private party which is injecting the racially discriminatory motivation. In the case at bar there is not the

slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will. Nor is there any indication that Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes. *Ante*, at 4. On the contrary, the language of the Senator's will shows that the racial restrictions were solely the product of the testator's own full-blown social philosophy. Similarly, the situation presented in this case is also easily distinguishable from that presented in *Shelley v. Kraemer*, 334 U. S. 1 (1948), where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued.

Petitioners also contend that since Senator Bacon did not expressly provide for a reverter in the event that the racial restrictions of the trust failed, no one can know with absolute certainty that the Senator would have preferred termination of the park rather than its integration, and the decision of the Georgia court therefore involved a matter of choice. It might be difficult to argue with these assertions if they stood alone, but then petitioners conclude: "Its [the court's] choice, the anti-Negro choice, violates the Fourteenth Amendment, whether it be called a 'guess,' an item in 'social philosophy,' or anything else at all." We do not understand petitioners to be contending here that the Georgia judges were motivated either con-

sciously or unconsciously by a desire to discriminate against Negroes. In any case, there is, as noted above, absolutely nothing before this Court to support a finding of such motivation. What remains of petitioners' argument is the idea that the Georgia courts had a constitutional obligation in this case to resolve any doubt about the testator's intent in favor of preserving the trust. Thus stated, we see no merit in the argument. The only choice the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia court to approach Bacon's will any differently than it would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and non-discriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.

Another argument made by petitioners is that the decision of the Georgia court holding that the Baconsfield trust had "failed" must rest logically on the unspoken premise that the presence or proximity of Negroes in Baconsfield would destroy the desirability of the park for whites. This argument reflects a rather fundamental misunderstanding of Georgia law. The Baconsfield trust "failed" under that law not because of any belief on the part of any living person that whites and Negroes might not enjoy being together but, rather, because Senator Bacon who died many years ago intended that the park remain forever for the exclusive use of white people.

Petitioners also advance a number of considerations of public policy in opposition to the conclusion which we have reached. In particular, they regret, as we do, the loss of the Baconsfield trust to the City of Macon, and they are concerned lest we set a precedent under which other charitable trusts will be terminated. It bears repeating that our holding today reaffirms the traditional role of the States in determining whether or not to apply their *cy pres* doctrines to particular trusts. Nothing we have said here prevents a state court from applying its *cy pres* rule in a case where the Georgia court, for example, might not apply its rule. More fundamentally, however, the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages. The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

In their lengthy and learned briefs, the petitioners and the Solicitor General as *amicus curiae* have advanced several arguments which we have not here discussed. We have carefully examined each of these arguments, however, and find all to be without merit.

The judgment is

Affirmed.

MR. JUSTICE MARSHALL took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1969

E. S. Evans et al., Petitioners, | On Writ of Certiorari to
v. | the Supreme Court of
Guyton G. Abney et al. | Georgia.

[January 26, 1970]

MR. JUSTICE DOUGLAS, dissenting.

Bacon's will did not leave any remainder or reversion in "Baconsfield" to his heirs. He left "all remainders and reversions and every estate in the same of whatsoever kind" to the City of Macon. He further provided that the property "under no circumstances, or by any authority whatsoever" should "be sold or alienated or disposed of, or at any time for any reason" be "devoted to any other purpose or use excepting so far as herein specifically authorized."

Giving the property to the heirs, rather than reserving it for some municipal use, does therefore as much violence to Bacon's purpose as would a conversion of an "all-white" park into an "all-Negro" park.

No municipal use is of course possible where the beneficiaries are members of one race only. That was true in 1911 when Bacon made his will. *Plessy v. Ferguson*, 163 U. S. 537, decided in 1896, had held that while "separate" facilities could be supplied each race, those facilities had to be "equal." The concept of "equal" in this setting meant not just another park for Negroes but one equal in quality and service to that municipal facility which is furnished the whites. See *Sweatt v. Painter*, 339 U. S. 629, 633-634. It is apparent that Bacon's will projected a municipal use which at the time was not constitutionally permissible unless like accommodations were made for the Negro race.

So far as this record reveals, the day the present park was opened to whites it may, constitutionally speaking, also have been available to Negroes.

The Supreme Court of Georgia stated that the sole purpose for which the trust was created had become impossible. But it was impossible in those absolute terms even under the regime of *Plessy v. Ferguson*. As to *cy pres*, the Georgia statute provides:

"When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention." Ga. Code Ann. § 108-202 (1959).

The Georgia court held that the doctrine of *cy pres* "can not be applied to establish a trust for an entirely different purpose from that intended by the testator." 224 Ga. 826, 830, 165 S. E. 2d 160, 164. That however does not state the issue realistically. No proposal to bar use of the park by whites has ever been made, except the reversion ordered to the heirs. Continuation of the use of the property as a municipal park or, for another municipal purpose carries out a larger share of Bacon's purpose than the complete destruction of such use by the decree we today affirm.

The purpose of the will was to dedicate the land for some municipal use. That is still possible. Whatever that use, Negroes will of course be admitted, for such is the constitutional command. But whites will also be admitted. Letting both races share the facility is closer to a realization of Bacon's desire than a complete destruction of the will and the abandonment of Bacon's desire that the property be used for some municipal purpose.

Bacon, in limiting the use of this park property "to white people," expressed the view that "in their social relations the two races (white and negro) should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common." Can we possibly say that test puts a curse on each and every municipal use—music festivals, medical clinics, hospitals?

Moreover, putting the property in the hands of the heirs will not necessarily achieve the racial segregation which Bacon desired. We deal with city real estate. If a theatre is erected, Negroes cannot be excluded. If a restaurant is opened, Negroes must be served. If office or housing structures are erected, Negro tenants must be eligible. If a church is erected, mixed marriage ceremonies may be performed. If a court undertook to attach a racial use condition to the property once it became "private," that would be an unconstitutional covenant or condition.

Bacon's basic desire can be realized only by the repeal of the Fourteenth Amendment. So the fact is that in the vicissitudes of time there is no constitutional way to assure that this property will not serve the needs of Negroes.

The Georgia decision, which we today approve, can only be a gesture toward a state-sanctioned segregated way of life, now *passé*. It therefore should fail as the imposition of a penalty for obedience to a principle of national supremacy.

SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1969

E. S. Evans et al., Petitioners, | On Writ of Certiorari to
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[January 26, 1970]

MR. JUSTICE BRENNAN, dissenting.

For almost half a century Baconsfield has been a public park. Senator Bacon's will provided that upon the death of the last survivor among his widow and two daughters title to Baconsfield would vest in the Mayor and Council of the City of Macon and their successors forever. Pursuant to the express provisions of the will, the Mayor and City Council appointed a Board of Managers to supervise the operation of the park, and from time to time these same public officials made appointments to fill vacancies on the Board. Senator Bacon also bequeathed to the city certain bonds which provided income used in the operation of the park.

The city acquired title to Baconsfield in 1920 by purchasing the interests of Senator Bacon's surviving daughter and another person who resided on the land. Some \$46,000 of public money was spent over a number of years to pay the purchase price. From the outset and throughout the years the Mayor and City Council acted as trustees, Baconsfield was administered as a public park. T. Cleveland James, superintendent of city parks during this period, testified that when he first worked at Baconsfield it was a "wilderness . . . nothing there but just undergrowth everywhere, one road through there and that's all, one paved road." He said there were no park facilities at that time. In the 1930's Baconsfield was transformed into a modern recrea-

tional facility by employees of the Works Progress Administration, an agency of the Federal Government. WPA did so upon the city's representation that Baconsfield was a public park. WPA employed men daily for the better part of a year in the conversion of Baconsfield to a park. WPA and Mr. James and his staff cut underbrush, cleared paths, dug ponds, built bridges and benches, planted shrubbery, and, in Mr. James' words, "just made a general park out of it." Other capital improvements were made in later years with both federal and city money. The Board of Managers also spent funds to improve and maintain the park.

Although the Board of Managers supervised operations, general maintenance of Baconsfield was the responsibility of the city's superintendent of parks. Mr. James was asked whether he treated Baconsfield about the same as other city parks. He answered, "Yes, included in my appropriation" The extent of the city's services to Baconsfield is evident from the increase of several thousand dollars in the annual expenses incurred for maintenance by the Board of Managers after the Mayor and City Council withdrew as trustees in 1964.

The city officials withdrew after suit was brought in a Georgia court by individual members of the Board of Managers to compel the appointment of private trustees on the ground that the public officials could not enforce racial segregation of the park. The Georgia court appointed private trustees, apparently on the assumption that they would be free to enforce the racially restrictive provision in Senator Bacon's will. In *Evans v. Newton*, 382 U. S. 296 (1966), we held that the park had acquired such unalterable indicia of a public facility that for the purposes of the Equal Protection Clause it remained "public" even after the city officials were replaced as trustees by a board of private citizens. Consequently, Senator Bacon's discriminatory purpose could

not be enforced by anyone. This Court accordingly reversed the Georgia court's acceptance of the city officials' resignations and its appointment of private trustees. On remand the Georgia courts held that since Senator Bacon's desire to restrict the park to the white race could not be carried out, the trust failed and the property must revert to his heirs. The Court today holds that that result and the process by which it was reached do not constitute a denial of equal protection. I respectfully dissent.

No record could present a clearer case of the closing of a public facility for the sole reason that the public authority which owns and maintains it cannot keep it segregated. This is not a case where the reasons or motives for a particular action are arguably unclear, cf. *Palmer v. Thompson*, — F. 2d — (C. A. 5th Cir., 1969) (en banc), nor is it one where a discriminatory purpose is one among other reasons, cf. *Johnson v. Branch*, 364 F. 2d 177 (C. A. 4th Cir., 1966), nor one where a discriminatory purpose can be found only by inference, cf. *Gomillion v. Lightfoot*, 364 U. S. 339 (1960). The reasoning of the Georgia Supreme Court is simply that Senator Bacon intended Baconsfield to be a segregated public park, and because it cannot be operated as a segregated public park any longer, *Watson v. Memphis*, 373 U. S. 526 (1963); see *Mayor & City Council of Baltimore v. Dawson*, 350 U. S. 877 (1955), the park must be closed down and Baconsfield must revert to Senator Bacon's heirs. This Court agrees that this "city park is [being] destroyed because the Constitution require[s] it to be integrated . . ." No one has put forward any other reason why the park is reverting from the City of Macon to the heirs of Senator Bacon. It is therefore quite plain that but for the constitutional prohibition on the operation of segregated public parks, the City of Macon would continue to own and maintain Baconsfield.

I have no doubt that a public park may constitutionally be closed down because it is too expensive to run or has become superfluous, or for some other reason, strong or weak, or for no reason at all. But under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility. In *Griffin v. County School Board*, 377 U. S. 218, 231 (1964), we said, "Whatever nonracial grounds might support a State's allowing a county to abandon its public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." In this context what is true of public schools is true of public parks. When it is as starkly clear as it is in this case that a public facility would remain open but for the constitutional command that it be operated on a non-segregated basis, the closing of that facility conveys an unambiguous message of community involvement in racial discrimination. Its closing for the sole and unmistakable purpose of avoiding desegregation, like its operation as a segregated park, "generates [in Negroes] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U. S. 483, 494 (1954). It is no answer that continuing operation as a segregated facility is a constant reminder of a public policy which stigmatizes one race, whereas its closing occurs once and is over. That difference does not provide a constitutional distinction: state involvement in discrimination is unconstitutional, however short-lived.

The Court, however, affirms the judgment of the Georgia Supreme Court on the ground that the closing of Baconsfield did not involve state action. The Court concedes that the closing of the park by the city "solely to avoid the effect of a prior court order directing that

the park be integrated" would be unconstitutional. However, the Court finds that in this case it is not the State or city but "a private party which is injecting the racially discriminatory motivation," *supra*, p. 9. The exculpation of the State and city from responsibility for the closing of the park is simply indefensible on this record. This discriminatory closing is permeated with state action: at the time Senator Bacon wrote his will Georgia statutes expressly authorized and supported the precise kind of discrimination provided for by him; in accepting title to the park, public officials of the City of Macon entered into an arrangement vesting in private persons the power to enforce a reversion if the city should ever incur a constitutional obligation to desegregate the park; it is a *public* park that is being closed for a discriminatory reason after having been operated for nearly half a century as a segregated *public* facility; and it is a state court which is enforcing the racial restriction which keeps apparently willing parties of different races from coming together in the park. That is state action in overwhelming abundance. I need emphasize only three elements of the state action present here.

First, there is state action whenever a State enters into an arrangement which creates a private right to compel or enforce the reversion of a public facility. Whether the right is a possibility of reverter, a right of entry, an executory interest, or a contractual right, it can be created only with the consent of a public body or official, for example the official action involved in Macon's acceptance of the gift of Baconsfield. The State's involvement in the creation of such a right is also involvement in its enforcement; the State's assent to the creation of the right necessarily contemplates that the State will enforce the right if called upon to do so. Where, as in this case, the State's enforcement role conflicts with its obligation to comply with the constitutional command

against racial segregation the attempted enforcement must be declared repugnant to the Fourteenth Amendment.

Moreover, a State cannot divest itself by contract of the power to perform essential governmental functions. *E. g., Contributors to the Pennsylvania Hospital v. City of Philadelphia*, 245 U. S. 20 (1917); *Stone v. Mississippi*, 101 U. S. 814 (1880). Thus a State cannot bind itself not to operate a public park in accordance with the Equal Protection Clause, upon pain of forfeiture of the park. The decision whether or not a public facility shall be operated in compliance with the Constitution is an essential governmental decision. An arrangement which purports to prevent a State from complying with the Constitution cannot be carried out, *Evans v. Newton*, *supra*; see *Pennsylvania v. Board of Directors*, 353 U. S. 230 (1957). Nor can it be enforced by a reversion; a racial restriction is simply invalid when intended to bind a public body and cannot be given any effect whatever, cf. *Pennsylvania v. Brown*, 392 F. 2d 120 (C. A. 3d Cir.).

Initially the City of Macon was willing to comply with its constitutional obligation to desegregate Baconsfield. For a time the city allowed Negroes to use the park, "taking the position that the park was a public facility which it could not constitutionally manage on a segregated basis." *Evans v. Newton*, *supra*, at 297. But the Mayor and Council reneged on their constitutional duty when the present litigation began, and instead of keeping Baconsfield desegregated they sought to sever the city's connection with it by resigning as trustees and telling Superintendent James to stop maintaining the park. The resolution of the Mayor and Council upon their resignation as trustees makes it very clear that the probability of a reversion had induced them to abandon desegregation. Private interests of the sort asserted by the respondents here cannot constitutionally be allowed to control the conduct of public affairs in that manner.

A finding of discriminatory state action is required here on a second ground. *Shelley v. Kraemer*, 334 U. S. 1 (1948), stands at least for the proposition that where parties of different races are willing to deal with one another a state court cannot keep them from doing so by enforcing a privately authored racial restriction. See also *Sweet Briar Institute v. Button*, 280 F. Supp. 312 (D. C. W. D. Va. 1967) (state attorney general enjoined from enforcing privately authored racial restriction). Nothing in the record suggests that after our decision in *Evans v. Newton, supra*, the City of Macon retracted its previous willingness to manage Baconsfield on a nonsegregated basis, or that the white beneficiaries of Senator Bacon's generosity were unwilling to share it with Negroes, rather than have the park revert to his heirs. Indeed, although it may be that the city would have preferred to keep the park segregated, the record suggests that, given the impossibility of that goal, the city wanted to keep the park open. The resolution by which the Mayor and Council resigned as trustees prior to the decision in *Evans v. Newton, supra*, reflected not opposition to the admission of Negroes into the park, but a fear that if Negroes were admitted the park would be lost to the city. The Mayor and Council did not participate in this litigation after the decision in *Evans v. Newton*. However, the Attorney General of Georgia was made a party after remand from this Court, and, acting "as parens patriae in all legal matters pertaining to the administration and disposition of charitable trusts in the State of Georgia in which the rights of beneficiaries are involved," he opposed a reversion to the heirs and argued that Baconsfield should be maintained "as a park for all the citizens of the State of Georgia." Thus, so far as the record shows, this is a case of a state court's enforcement of a racial restriction to prevent willing parties from dealing with one another. The decision of

the Georgia courts thus, under *Shelley v. Kraemer*, constitutes state action denying equal protection.

Finally, a finding of discriminatory state action is required on a third ground. In *Reitman v. Mulkey*, 387 U. S. 369 (1967), this Court announced the basic principle that a State acts in violation of the Equal Protection Clause when it singles out racial discrimination for particular encouragement, and thereby gives it a special preferred status in the law, even though the State does not itself impose or compel segregation. This approach to the analysis of state action was foreshadowed in MR. JUSTICE WHITE's concurring opinion in *Evans v. Newton*, *supra*. There MR. JUSTICE WHITE comprehensively reviewed the law of trusts as that law stood in Georgia in 1905, prior to the enactment of §§ 69-504 and 69-505 of the Georgia Code. He concluded that prior to the enactment of those statutes "it would have been extremely doubtful" whether Georgia law authorized "a trust for park purposes when a portion of the public was to be excluded from the park." 382 U. S., at 310. Sections 69-504 and 69-505 removed this doubt by expressly permitting dedication of land to the public for use as a park open to one race only. Thereby Georgia undertook to facilitate racial restrictions as distinguished from all other kinds of restriction on access to a public park. *Reitman* compels the conclusion that in doing so Georgia violated the Equal Protection Clause.

In 1911, only six years after the enactment of §§ 69-504 and 69-505, Senator Bacon, a lawyer, wrote his will. When he wrote the provision creating Baconsfield as a public park open only to the white race, he was not merely expressing his own testamentary intent, but was taking advantage of the special power Georgia had conferred by §§ 69-504 and 69-505 on testators seeking to establish racially segregated public parks. As MR. JUSTICE WHITE concluded in *Evans v. Newton*, "the State

through its regulations has become involved to such a significant extent' in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction 'must be held to reflect . . . state policy and therefore to violate the Fourteenth Amendment.'" 382 U. S., at 311. This state-encouraged testamentary provision is the sole basis for the Georgia courts' holding that Baconsfield must revert to Senator Bacon's heirs. The Court's finding that it is not the State of Georgia but "a private party which is injecting the racially discriminatory motivation" inexcusably disregards the State's role in enacting the statute without which Senator Bacon could not have written the discriminatory provision.

This, then, is not a case of private discrimination. It is rather discrimination in which the State of Georgia is "significantly involved," and enforcement of the reverter is therefore unconstitutional. Cf. *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961); *Robinson v. Florida*, 378 U. S. 153 (1964).

I would reverse the judgment of the Supreme Court of Georgia.